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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 453

RAY H. GARNER, ET AL., PETITIONERS,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES, ET AL.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

PETITION FOR CERTIORARI FILED DECEMBER 12, 1950.

CERTIORARI GRANTED MARCH 5, 1951.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

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ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

INDEX

	Original	Print
Record from Superior Court of the State of California in and for the County of Los Angeles	1	1
Consolidated petitions for writ of mandate	1	1
Exhibit 1—Ordinance No. 94,004 of the City of Los Angeles	18	11
Exhibit 2—Form of oath and affidavit	19	18
Exhibit 3—Letter dated December 29, 1948 from Personnel Director to Ray H. Garner	21	21
Exhibit 4—Letter dated January 3, 1949 from Ray H. Garner to Dept. of Public Works	32	22
Exhibit 5—Notice to Ray H. Garner of discharge dated January 6, 1949	55a	23
Exhibit 6—Letter dated March 2, 1949 from Board of Civil Service Commissioners to Charles J. Katz	59	25
Exhibit 7—Letter dated March 7, 1949 from Ray H. Garner to City Clerk	61	26
Exhibit 8—Letter dated March 7, 1949 from Ray H. Garner to Civil Service Commission	78	27

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—1568

	Original	Print
Record from Superior Court of the State of California in and for the County of Los Angeles—Continued		
Respondents' points and authorities in opposition to granting of alternative writ of mandate	97	28
Order denying alternative writ of mandate	104	32
Notice of appeal	107	34
Petition for hearing in Supreme Court of California	114	35
Appendix—Opinion of the District Court of Appeal, Second Appellate District	164	40
Clerk's certificate (omitted in printing)	174	
Order denying petition for hearing	175	47
Stipulation as to record	176	47
Order allowing certiorari	178	48

[fol. a] APPEARANCES:

Charles J. Katz, Esq., Suite 1220 Garfield Building, 403 West Eighth Street, Los Angeles 14, California, Counsel for Appellants.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, 400 City Hall, Los Angeles 12, California, Counsel for Respondents.

[fol. 1] **Clerk's Transcript**

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

559954

RAY H. GARNER; HARRY BECKERMAN; AIDA BELDNER; JOHN R. BROWN; CARRIE L. DICK; MARY E. GRUNEWALD; EUGENE HALLETT; MARGARET B. HASKELL; EDWARD HAVENS; CORNELIUS LAWRENCE; VERA MANN; OLA ROSS PACIFICO; DANA PLATT; EUGENE REED; FRANCES SCHWARTZ; WILLARD SMART; FRANK TORREANO; Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; CLARENCE J. DERRICK, JOSEPH O. DONOVAN, LOUIS M. DREVES, FRANK GILLELEN, EDWARD L. TAYLOR, and MILTON OFFNER, as members of the Board of Public Works of the City of Los Angeles; BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; SAMSON A. LINDAUER, JUSTIN W. GILLETTE, CHARLES E. ARNN, RANSOM M. CALLICOTT, and MRS. IDA S. LAZARD, as members of the Board of Civil Service Commissioners of the City of Los Angeles; DAN O. HOYE, City Controller of the City of Los Angeles; THE CITY OF LOS ANGELES, a municipal corporation; Respondents.

CONSOLIDATED PETITIONS FOR WRIT OF MANDATE

Petitioners hereinabove named respectfully petition for a writ of mandate, and allege that:

[fol. 2] I

Petitioners are Citizens of the United States and of California; and at all times herein have been such citizens;

they are the parties beneficially interested; and the parties who will be affected by this petition are the petitioners and the respondents above named.

II

The respondents, Clarence J. Derrick, Joseph O. Donovan, Louis M. Dreves, Frank Gillelen, Edward L. Taylor, and Milton Offner, are members of the Board of Public Works of the City of Angeles; the respondents, Samson A. Lindauer, Justin W. Gillette, Charles E. Arnn, Ransom M. Callicott, and Mrs. Ida S. Lazard, are members of the Board of Civil Service Commissioners of the City of Los Angeles; the respondent, Dan O. Hoye, is the City Controller of the City of Los Angeles; the respondent, The City of Los Angeles, is a municipal corporation and a political subdivision of the State of California charged with government power, including the power to sue and be sued.

III

Petitioners were duly and regularly appointed to positions in the classified service of the City of Los Angeles in the positions of, rate of pay, and duration of service, as more specifically set forth below:

[fol. 3]

Name	Position held	Approx. monthly rate of pay	In the employ of the city since approx.
Ray H. Garner	Equipment Operator	$320.00	1936
Harry Beckerman	Photographer	250.00	March, 1947
Aida Beldner	Intermediate Clerk, Typist	236.00	March, 1943
John R. Brown	Maintenance Laborer	190.00	July, 1948
Carrie L. Dick	Intermediate Clerk	248.00	1947
Mary E. Grunewald	Librarian	259.00	1946
Eugene Hallett	Civil Engineering Associate	494.00	1936
Margaret B. Haskell	Clerk, Typist	190.00	1934
Edward Havens	Electrical Mechanic	373.00	1947
Cornelius Lawrence	Maintenance Laborer	250.00	1946
Vera Mann	Intermediate Clerk, Typist	200.00	1948
Ola Ross Pacifico	Public Health Nurse	283.00	1947
Dana Platt	Clerk	220.00	1944

[fol. 4]

Eugene Reed	Tree Trimmer	325.00	1938
Frances Schwartz	Public Health Nurse	273.00	1947
Willard Smart	Junior Mechanical Engineer, Grade B	469.00	1939
Frank Torreano	Maintenance Construction Helper	246.00	1936

IV

On or about October 21, 1948, the Council of the City of Los Angeles passed an Ordinance Number 94,004 which became effective December 6, 1948, a copy of which is hereto attached, marked Exhibit "1" and incorporated herein by reference; said Ordinance required employees of the City of Los Angeles to subscribe to an oath of loyalty, and to execute an affidavit of membership or non-membership in the Communist Party of the United States and the Communist Political Association. A Copy of said oath and affidavit are hereto annexed, marked Exhibit "2".

V

On or about December 29, 1948, each petitioner was notified either orally or in writing as set forth in the copies [fol. 5] of the written communications which are hereto attached, marked Exhibit "3" and incorporated herein by reference; the substance of said notifications was that:

1. Under the provisions of Ordinance Number 94,004 each employee of the City of Los Angeles who could truthfully do so, must take and sign an oath of loyalty to the United States; the Ordinance set forth the form of the oath and prescribed January 5, 1949, as the end of the filing period; within the same period each employee was to sign and file and affidavit stating whether or not he was or ever had been a member of the Communist Party of the United States or the Communist Political Association.

2. The respondents did not wish any employee to fail to sign the oath or the affidavit either because he had not been given an opportunity to do so or because of any ignorance or misunderstanding as to the requirements, purposes or application of the Ordinance.

3. The immediate supervisor of each petitioner employee reported that each petitioner was given an opportunity to sign the oath and affidavit, but that he had stated his refusal to do so. In order that the facts might be clear and without misunderstanding, each petitioner was requested to forward to the office of the respondents a writing stating fully his position in the matter and all of his reasons therefor. This communi- [fol. 6] cation was signed by the Personnel Director of the respective departments.

VI

On January 3, 1949, or thereabouts, in response to the above written communication from the respondent, Board of Public Works, the substance of which was set forth above, each petitioner who was in writing requested to do so, excepting Edward Havens, did set forth in copies of communications hereto annexed and marked Exhibit "4", his reasons for not signing the oath and affidavit in the form required under Ordinance 94,004.

VII

On January 6, 1949, the respondent, Board of Public Works of the City of Los Angeles and its members as set forth above, pursuant to Ordinance Number 94,004, ordered the discharge of petitioners effective January 7, 1949, from their respective positions, as indicated in paragraph III, and from the service of the City of Los Angeles, and thereafter caused to be served on the petitioners notices of discharge, photostatic copies of which are hereto attached and marked Exhibit "5" and made a part of this petition, which set forth the reasons for such discharge. With more particularity, the reasons given for the discharge of petitioners were:

Petitioners Harry Beckerman, Aida Beldner, Carrie L. Dick, Eugene Hallett, Vera Mann, Dana Platt, and Willard [fol. 7] Smart were discharged for:

Cause One: Each petitioner failed to take and subscribe to the oath set forth in Section 1 of Ordinance Number 94,004 passed by the Council of the City of Los Angeles on October 21, 1948, as required by the provisions of the said Ordinance.

Cause Two: Each petitioner failed to execute an affidavit stating whether or not he was or ever had been a member of the Communist Party of the United States of America or the Communist Political Association within the time required by the provisions of the said Ordinance.

Cause Three: Each petitioner refused to execute the said affidavit within the time provided by the said Ordinance, notwithstanding the fact that he was directed so to do.

Petitioners John R. Brown, Mary E. Grunewald, Margaret B. Haskell, Edward Havens, Cornelius Lawrence, Eugene Reed, Frances Schwartz, and Ray H. Garner were discharged for the reasons given below:

Cause One: Each petitioner failed to take and subscribe to the oath set forth in Section 1 of Ordinance Number 94,004 passed by the Council of the City of Los Angeles on October 21, 1948, as required by the provisions of the said Ordinance.

Cause Two: Each petitioner failed to execute an oath stating whether or not he was or ever had been a [fol. 8] member of the Communist Party of the United States of America or the Communist Political Association within the time required by the provisions of the said Ordinance.

The reasons given for the discharge of petitioners Ola Ross Pacifico and Frances Schwartz were:

Cause One: Each petitioner failed to execute an affidavit stating whether or not she was or ever had been a member of the Communist Party of the United States of America or the Communist Political Association, as required by the provisions of Section 4 of Ordinance Number 94,004 passed by the Council of the City of Los Angeles on October 21, 1948.

Cause Two: Each petitioner refused to execute the said affidavit within the time provided by the said ordinance, notwithstanding the fact that she was directed so to do.

VIII

On February 2, 1949, and within the time required therefor, the petitioners appealed to the Board of Civil Service Commissioners from the action taken by the Board of Public Works of the City of Los Angeles, and demanded in writing that the Board of Civil Service Commissioners investigate the ground for the discharge of said petitioners.

Thereafter, the Board of Civil Service Commissioners held hearings on February 10, 1949, and on February 18, 1949, inquiring into the discharge of the petitioners by

[fol. 9] virtue of the provisions of Ordinance Number 94,004, and thereafter and on March 1, 1949, said Board, pursuant to Ordinance Number 94,004, sustained the discharge of petitioners; a notification of such findings, supporting the discharge by the Board of Public Works, was duly served on petitioners; a copy of said notification served on the attorney for the petitioners is attached hereto, marked Exhibit "6", and incorporated herein by reference.

IX

On or about March 7, 1949, pursuant to Charter provision 112½ of the Charter of the City of Los Angeles, petitioners each filed separate claims for unpaid salaries with the City Clerk of the City of Los Angeles; copies of which are hereto annexed and marked Exhibit "7"; on March 7, 1949, petitioners each filed with the respondent, Board of Civil Service Commissioners, his application for reinstatement pursuant to Ch-rter Provision 112½ of the City Charter of the City of Los Angeles; copies of said applications are hereto annexed and marked Exhibit "8"; thereafter, and on or about March 15, 1949, both the request for unpaid salary and the application for reinstatement were denied by respondents pursuant to Ordinance Number 94,004.

X

Since the date of their discharges, petitioners have not been employed in their regular positions, or in any position, for the City of Los Angeles, but on the contrary have been [fol. 10] refused work and are not now permitted to work and are not now working for said respondent, City of Los Angeles, in any position.

That but for the matter of asserted failure to comply with the provisions of Ordinance Number 94,004, petitioners each performed the services required of him in a competent and satisfactory manner; and petitioners were at all times herein mentioned fit and suitable persons to fill the positions from which they were removed.

XI

The grounds for petitioners' discharges, as set forth by the respondent, Board of Public Works, do not comply with

Section 112 of the Charter of the City of Los Angeles, which provides that:

> "No person in the classified civil service of the City shall be removed, discharged or suspended except for cause";

that the acts of the respondents alleged in paragraphs VII, VIII and IX herein were without cause, were arbitrary, capricious and beyond their jurisdiction, and were in violation of Section 112 of the Charter of the City of Los Angeles in that petitioners' failure to conform to Ordinance Number 94,004 has no relation to their ability to perform duties required under their employment with the City of Los Angeles, and to their fitness and suitability to fill the positions from which they were removed.

[fol. 11]

XII

The acts of the respondents alleged in paragraphs VII, VIII and IX herein were without cause, were arbitrary, capricious and beyond their jurisdiction in that they were taken pursuant to and on account of Ordinance Number 94,004; and said Ordinance is unlawful, void and of no effect for the reasons that:

(a) It is contrary to Section 103 of the Charter of the City of Los Angeles in that it required petitioners as a condition for continued employment to submit to an inquiry into their political affiliations by asserting or denying whether each was or was not a member of the Communist Party of the United States, or of the Communist Political Association, both of which were at all times herein material, political organizations.

(b) It is contrary to Article XI, Section 8h of the Constitution of the State of California, in that it amends, or purports to amend, Section 103 and Section 432 of the Charter of the City of Los Angeles by an Ordinance passed by the City Council and approved and signed by the Mayor of the City of Los Angeles, and not in the manner set out in said Article XI, Section 8h.

(c) It denies to petitioners and deprives petitioners of liberties without due process of law, in violation of the First, Ninth, Tenth, and Fourteenth Amendments to the Constitution of the United States in that:

[fol. 12] (1) It required petitioners, as a condition of continued employment, to disclose their affiliations or lack of affiliations, with the Communist Party of the United States and the Communist Political Association which are and at all times herein material, political organizations.

(2) Said Ordinance and the requirement herein alleged interfered with, restrained, coerced and abridged petitioners in the exercise of their rights and duties of political expression through membership in and activities on behalf of the Communist Party, a political organization, including without limitation, speech, press, assembly, association and petition for redress of grievances.

(d) It denies to petitioners due process of law in violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States in that it required petitioners to disclose their affiliation with or lack of affiliation with the Communist Party of the United States and the Communist Political Association, both of which were at all times herein material, political organizations, and thereby violated petitioners' right to privacy and to be silent in such matters.

(e) It denies to petitioners rights under the Constitution of the State of California in that:

[fol. 13] (1) It required petitioners as a condition of continued employment to disclose their affiliation or lack of affiliation with the Communist Party of the United States and the Communist Political Association, which are and at all times herein material, were political organizations.

(2) Said Ordinance and the requirement herein alleged interfered with, restrained, coerced and abridged petitioners in the exercise of their rights and duties of political expression through membership in and activities on behalf of the Communist Party of the United States, a political organization, including without limitation speech, press, assembly, association and petition for redress of grievances.

(f) It denies to petitioners rights under Article I, Sections 9 and 13 of the Constitution of the State of California, in that it required petitioners to disclose their affiliations with or lack of affiliation with, the Communist Party of the United States and the Communist Political Association, both of which were at all times herein material, political

organizations, and thereby violated petitioners' rights to privacy and to be silent in such matters.

(g) It requires petitioners to give evidence against themselves concerning their affiliation, or lack of affiliation, with the Communist Party of the United States and the Com-
[fol. 14] munist Political Association, both of which were at all times herein material, political organizations, contrary to Article I, Section 13 of the Constitution of the State of California.

(h) It denies to petitioners due process of law in contravention of Article II, Section 9, and the Fourteenth Amendment to the Constitution of the United States, in that it subjects petitioners to penalties, including discharge and public stigmatization as disloyal, by reason of membership in the Communist Party of the United States or the Communist Political Association, both of which at all times herein material, were political organizations, prior to the adoption and effective date of said ordinance, and is thereby an ex post facto law and bill of attainder.

(i) It subjects petitioners, in contravention to Article I, Section 16, of the Constitution of the State of California, to penalties, including discharge and public stigmatization as disloyal, by reason of membership in the Communist Party of the United States or the Communist Political Association, both of which at all times herein material, were political organizations, prior to the adoption and effective date of said ordinance, and is thereby an ex post facto law and bill of attainder.

(j) It deprives petitioners of due process of law, in violation of the Fourteenth Amendment to the Constitution of
[fol. 15] the United States, and Article I, Section 13 of the Constitution of the State of California and the division of governmental powers prescribed in the Constitution of the United States and the State of California, in that said Ordinance constitutes a finding and determination by a legislative body pursuing legislative functions, that the Communist Party of the United States and the Communist Political Association, were and are engaged in the commission of a crime under the laws of the State of California and the United States to wit, the overthrow of the government by force and violence, and the authority to make such a finding is reserved solely to the Courts.

XIII

These petitioners have no plain, speedy or adequate remedy at law, for Section 112A of the Charter of the City of Los Angeles, which section controls the matter of discharge and reinstatement of employees, provides that the order of the respondent, Board of Civil Service Commissioners, shall be final and conclusive with respect to the removal, discharge or suspension of employees, and that therefore there is no method of appeal or any other procedure except by means of this petition, whereby the petitioners can question said determination and secure a complete adjudication of their rights and adequate and complete relief.

[fol. 16] Wherefore, petitioners pray that a day and date be fixed for the hearing of this petition, and upon the hearing thereof, a peremptory writ of mandate issue out of the above entitled Court:

1. Directed to the respondent, Board of Public Works of the City of Los Angeles, and the members thereof, to reinstate each petitioner to the positions from which they were removed, as set forth in paragraph III, and to permit each petitioner to perform the duties of said position, and to restore to each petitioner all the rights incident to said position, and to cause demands and pay checks to be issued to said petitioners for the amount of salary or wages due petitioners from the 7 day of January, 1949, until reinstated to duty at the monthly rates set forth in paragraph III, together with any general wage increases granted to said classifications since January 7, 1949; and

2. Ordering and commanding the respondent, Board of Civil Service Commissioners of the City of Los Angeles, and the members thereof, to certify that each petitioner has been duly and regularly appointed to the position from which he was removed, as indicated in paragraph III herein, and to approve the salary as compensation due him from January 7, 1949, and thereafter in accordance with the rules of the Board of Civil Service Commissioners; and

[fol. 17] 3. Ordering and commanding the respondent, Dan O. Hoye, City Controller of the City of Los Angeles, or the officer acting as such City Controller, to make payment to each petitioner for said amounts.

Petitioners further pray for such other relief as to the Court may seem meet; and for their costs incurred herein.

Charles J. Katz, Counsel for Petitioners.

[fol. 18] EXHIBIT 1 TO PETITION

Ordinance No. 94,004

An Ordinance to effectuate the provisions of Charter Section 432 and otherwise to insure the loyalty of the officers and employees of this City.

The People of the City of Los Angeles Do Ordain As Follows:

Section 1. Every person who is hereafter elected or appointed to an office or position in the service of the City of Los Angeles must, before entering upon the duties of his office or position, take and subscribe to the following oath:

I, ..., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America and the State of California, and will support and defend the Constitution and laws of the United States of America and of the State of California and the laws of the City of Los Angeles against all enemies, foreign and domestic. I further swear (or affirm) that I do not advise, advocate or teach, and have not within the period beginning five (5) years prior to the effective date of the ordinance requiring the making of this oath or affirmation, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California and that I am not now and have not, within said period, been or become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of California. I further swear (or affirm) that I will not, while I am in the service of the City of Los Angeles, advise, advocate or teach, or be or become a member of or affiliated with any group, association, society, organization or party which advises, advocates or teaches,

or has within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California, that I will well and faithfully discharge the duties of my office or employment in the service of the City of Los Angeles and that I take this whole obligation freely without any mental reservation or purpose of evasion, So Help Me God.

Sec. 2. Every person who now holds or occupies an office or position in the service of the City of Los Angeles must, within thirty (30) days after the effective date of this ordinance, or if he be on leave or under suspension for cause from the service of the city at such effective date, within thirty (30) days after his return to such service, take and subscribe to the oath set forth in Section 1 hereof.

Sec. 3. Every person who is hereafter elected or appointed to an office or position in the service of the City of Los Angeles must, before entering upon the duties of his office or position, execute an affidavit stating whether or not he is or ever was a member of the Communist Party of the United States of America or of the Communist Political Association, and if he is or was such a member, stating the dates when he became, and the periods during which he was, such a member; provided, however, that no additional affidavit shall be required on account of the transfer, demotion or promotion of any person who has once executed an affidavit under this section or under Section 4 hereof.

Sec. 4. Every person who now holds or occupies an office or position in the service of the City of Los Angeles must, within thirty (30) days after the effective date of this ordinance, or if he be on leave or under suspension for cause from the service of the city at such effective date, within thirty (30) days after his return to such service, execute an affidavit stating the facts required to be stated in the affidavit required by Section 3 of this ordinance.

Sec. 5. Each oath and affidavit required hereunder shall be taken, executed and signed before an officer authorized by law to administer oaths, and the jurat of such officer shall be affixed to the document so subscribed under the official seal of such officer. No officer or employee of the city shall require or receive the payment of any fee for administering any oath or affirmation provided for herein.

Sec. 6. The form of the affidavit required by Sections 3 and 4 hereof shall be prepared by the City Clerk. The City Clerk shall secure and maintain a supply of printed forms of the said affidavit and of the oath required by Sections 1 and 2 hereof, and shall furnish such forms as may be necessary to officers and employees of the city, to the Board of Civil Service Commissioners and to the heads of the departments of the city.

Sec. 7. The oaths and affidavits required hereby to be executed by officers and employees of the city who are appointed or employed under the provisions of Article IX of the City Charter shall be filed with the Board of Civil Service Commissioners and shall be a part of the officer's or employee's personnel record on file with the said board. All other oaths and affidavits required hereunder shall be filed with the City Clerk.

Sec. 8. It shall be the duty of each appointing power to require each officer or employee to execute and file an oath and affidavit as required hereby.

Sec. 9. Whenever an appointing authority is in doubt as to whether or not an officer or employee subject to his direction swore falsely in or has violated an oath required hereunder, he must investigate and determine the facts or, if he is the general manager of a department, he must either investigate and determine the facts or report the case to the board of commissioners of his department, and in the latter event the said board of commissioners must then investigate and determine the facts.

Sec. 10. (a) There shall be a committee of three (3) examiners, hereinafter called the "Committee," to investigate the cases hereafter described. One examiner shall be designated by the Board of Social Service Commissioners from among its members, one shall be designated by the Board of Police Commissioners from among its members, and the other shall be designated by the City Attorney from among his assistants or deputies. Such designations shall be made promptly after the effective date of this ordinance, and certificates thereof shall be filed with the Secretary of the Committee.

(b) The Secretary of the Board of Social Service Commissioners shall be and act as the Secretary of the Committee.

(c) As soon as the examiners are designated they shall meet and elect one of their number as chairman.

(d) The Board of Civil Service Commissioners shall, at the demand of the chairman of the Committee, furnish such stenographic assistance and supplies as may be needed.

(e) Either the Board of Social Service Commissioners or the Board of Police Commissioners may at any time designate another member to succeed the member of such board of commissioners then serving as an examiner, and the City Attorney may at any time designate another of his assistants or deputies to succeed the assistant or deputy City Attorney then serving as an examiner. After the designation of his successor, an examiner shall continue to serve as such until the completion of all pending matters, but the examiner designated as his successor shall upon his designation become an existing qualified examiner for all purposes connected with new matters.

(f) A majority of the examiners then serving may at any time elect another examiner to be chairman instead of the chairman then serving.

Sec. 11. A board of commissioners which is required hereby to conduct an investigation may do so by appointing the members of the Committee as examiners, under Section 89 of the Charter, to conduct the investigation and to submit their report thereon. Such board of commissioners is hereinafter called the "Commission" and the officer or employee to be investigated is hereinafter called the "Respondent." In each such case the provisions hereinafter contained in Sections 12 through 23, inclusive, shall be applicable.

Sec. 12 Such Commission shall transmit to the Secretary of the Committee a copy of its resolution determining that such investigation shall be made and appointing the members of the Committee as examiners to conduct such investigation. The Commission shall embody in such resolution, or transmit with such copy, a statement of the grounds for such investigation. The Secretary of the Committee shall then fix a time and place for beginning the inquiry, and shall give at least fifteen (15) days notice thereof to the examiners, the Respondent and the Commission. The notice to the Respondent shall include a statement of the grounds for the inquiry.

Sec. 13. The Committee shall meet at the time and

place fixed and shall then proceed to inquire into the matter. The Respondent shall be present at such meeting and at subsequent meetings of the Committee as directed by the management of his department.

Sec. 14. The Committee shall conduct a full investigation into the questions of whether or not the Respondent swore falsely in or violated any oath executed by him under this ordinance. A member of the Respondent's department designated by its appointing authority shall be present at each session of the investigation and shall present the facts constituting the grounds therefor.

Sec. 15. Any examiner shall have the power to administer oaths and affirmations to witnesses before the Committee. The chairman shall preside at all meetings of the Committee, direct the order of its business, and rule upon the admission of evidence. He may continue a meeting at any stage thereof, and may call a meeting at any time. He shall require the maintenance of order in the meeting room, may expel any disorderly person from the meeting room and may call upon the aid of the Chief of Police for such purposes. Any decision of the chairman shall be overruled at the demand of the other two (2) examiners.

Sec. 16. Upon the demand of an examiner the City Clerk shall issue a subpoena requiring the attendance as a witness of the person sought to be subpoenaed, at a time and place specified. Upon demand of such examiner, accompanied by an affidavit specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the questions involved in the investigation, and stating that the witness has the desired matters or things in his possession or under his control, such subpoena shall require the production of physical evidence. All such subpoenas shall be issued in the name of the city, and shall be attested with the city seal. The Chief of Police shall cause all such subpoenaes to be served by some member of the Police Department.

Sec. 17. The Respondent shall have the right to be present at all meetings of the Committee at which any evidence is received. He shall have the right to be confronted by all the witnesses who testify in the matter and to see or examine all written or physical evidence. He shall have the right to be represented by counsel, to cross examine witnesses other than the witnesses who are called by him, to obtain the issuance of subpoenas for the attendance of

witnesses and the production of evidence, and to produce evidence bearing upon the questions under consideration. The Respondent may testify as a witness, and it shall be his duty to testify as a witness at the direction of the appointing authority of his department. All testimony heard by the Committee shall be given under oath or affirmation. Before any evidence is received the chairman shall advise the Respondent of the Respondent's rights, privileges and duties hereunder and of his rights, privileges and immunities under the Constitution of the United States and under the Constitution of the State of California with respect to the Respondent giving testimony which might tend to incriminate or degrade him.

Sec. 18. Each examiner shall be present at all times during every meeting of such Committee; each must hear, examine or view all evidence considered, and must read all documents filed with or received by, such Committee, and each must read all reports proposed to be submitted by any examiner.

Sec. 19. At the direction of the chairman any of the proceedings before the Committee may be reported by a stenographic reporter in the employ of the city, and the report so made shall be transcribed at the direction of the chairman, or the commission. No copy of the transcript shall be delivered to anyone except by direction of the chairman, and upon the payment of the cost thereof to the City Treasurer, in an amount determined by the schedule of transcript fees now provided in the Code of Civil Procedure of this state; Provided, however, that if upon charges that he swore falsely in or violated an oath executed by him under this ordinance the Respondent is subsequently discharged from his position and requests a hearing before the Board of Civil Service Commissioners, or if such charges against the Respondent are filed with the Board of Fire Commissioners under Section 135 of the charter or with the Board of Police Commissioners under Section 202 of the charter, a true copy of the transcript shall be delivered to the Respondent upon his payment of the cost thereof.

Sec. 20. The meetings of the Committee shall not be public hearings. The Chairman may exclude from the meeting room any person other than the examiners, the Respondent and his counsel and such other persons as may

be present at the request of the Respondent; provided, however that if any reporter or any agent of any periodical publication is present at the request of the Respondent, at least one reporter or agent of each other periodical publication shall be allowed to be present. Neither the reports of proceedings before it nor the evidence received and filed by it nor the reports made by such Committee shall be public documents, and no person other than the examiners shall have a right to see or examine such papers or documents, except as provided by Sections 17, 19, and 21 hereof; provided, however, that such papers and documents shall be produced at the direction of the Board of Civil Service Commissioners in any hearing before it.

Sec. 21. When the Committee has considered all of the evidence received by it, it shall conclude its inquiry and shall prepare a written report upon the questions which it has considered. Any examiner who cannot agree with such a report shall prepare a separate report. Each report prepared shall contain a summary of the evidence considered, with findings of fact thereon, and conclusions and recommendations with a statement of the reasons therefor. A report agreed to by all of the examiners shall be signed by all of them; a report agreed to by two examiners shall be signed by both of them, and individual reports shall be signed by the examiners preparing them. All such reports, together with any transcript of the proceedings and all papers and things filed with or received by the Committee, shall thereupon be transmitted to the Commission.

Sec. 22. Upon its receipt and consideration of the report or reports from the Committee the Commission may adopt, reject or modify any such report in whole or in part, or may reconsider the matter in whole or in part, and shall thereafter take such action, or instruct its general manager to take such action respecting the retention or discharge of the Respondent, as appears to such Commission to be proper or to be required by law.

Sec. 23. Any person who fails or refuses without lawful excuse to attend at any meeting of the Committee, or to produce material evidence in his possession or under his control, as required by any subpoena served upon such person as provided for herein, or who, being present before such Committee willfully refuse to be sworn or to answer any material and proper question when directed by the

chairman of such Committee, shall be guilty of a misdemeanor and shall be punishable by a fine of not more than $500,00 or by imprisonment in the city jail for not more than six (6) months, or by both such fine and imprisonment.

Sec. 24. If any provision, section, paragraph, sentence, clause, phrase or word of this ordinance is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of any other part of this ordinance, and the Council hereby declares that it would have adopted each provision, section, paragraph, sentence, clause, phrase and word herein contained without regard to the adoption at the same time of other parts hereof.

Sec. 25. The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was introduced at the meeting of the Council of the City of Los Angeles of September 8, 1948, and was passed at its meeting of October 21, 1948.

Walter C. Peterson, City Clerk. By A. McCoy, Deputy.

Approved this 29th day of October, 1948.

Fletcher Bowron, Mayor.

C. F. 27647, Supp. #1 and #2 (20598) 11/5 1t.

[fol. 19] Read carefully, sign, have your signature acknowledged, and return to your supervisor or appointing authority.

EXHIBIT 2 TO PETITION

OATH AND AFFIDAVIT

A. Oath of Office or Employment

I, —— —— (Type or Print Name in Full) do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America and the State of California, and will support and defend the Constitution and laws of the United States of America and of the State of California and the laws of the City of Los Angeles against all

enemies, foreign and domestic. I further swear (or affirm) that I do not advise, advocate or teach, and have not within the period beginning five (5) years prior to the effective date (December 6, 1948) of the ordinance requiring the making of this oath or affirmation, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California and that I am not now and have not, within said period, been or become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of California. I further swear (or affirm) that I will not, while I am in the service of the City of Los Angeles, advise, advocate or teach, or be or become a member of or affiliated with any group, association, society, organization or party which advises, advocates or teaches, or has within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California, that I will well and faithfully discharge the duties of my office or employment in the service of the City of Los Angeles and that I take this whole obligation freely without any mental reservation or purpose of evasion, So Help Me God.

B. Affidavit of Non-Membership

I am not and have never been a member of either the Communist Party of the United States of America or of the Communist Political Association.

—— ——, Signature; —— ——, Department.

The above Oath was taken and subscribed and the above Affidavit was subscribed and sworn to before me this —— day of ——, 19—.

Walter C. Peterson, City Clerk, City of Los Angeles, State of California. By —— ——, Deputy.

or

—— ——, Notary Public. In and for the County of ——, State of California.

Instructions:

1. An ordinance of the City of Los Angeles requires all officers and employees of the City to take an Oath of Office or Employment and to sign an Affidavit as to membership in the Communist Party of the United States of America or the Communist Political Association.

2. If you are now or ever have been a member of the Communist Party of the United States of America or the Communist Political Associaton, cross out the Affidavit of Non-Membership above and ask for and fill out the form entitled "Affidavit as to Membership."

3. If a Deputy City Clerk is not available, the Oath and Affidavit may be acknowledged by a Notary Public who will fill in the Notary Public form above and affix his seal.

[fol. 20] Read carefully, sign, have your signature acknowledged, and return to your supervisor or appointing authority.

AFFIDAVIT AS TO MEMBERSHIP

—— —— (Type or Print Name in Full) being duly sworn, says:

1. I am not now and have never been a member of the Communist Party of the United States of America.

2. I am not now and have never been a member of the Communist Political Association.

3. I am now a member of the Communist Party of the United States of America. I became such a member on —— ——, 19—. I was previously a member from —— ——, 19—, to —— ——, 19—.

4. I am now a member of the Communist Political Association. I became such a member on —— ——, 19—. I was previously a member from —— ——, 19—, to —— ——, 19—.

5. I am not now, but I was a member of the Communist Party of the United States of America during the period from —— ——, 19—, to —— ——, 19—, and during the period from —— ——, 19—, to —— ——, 19—.

6. I am not now, but I was a member of the Communist Political Association during the period from —— ——, 19—,

to —— ——, 19 —, and during the period from —— ——, 19 —, to —— ——, 19—.

—— ——, Signature; —— ——, Department.

The above Affidavit was subscribed and sworn to before me this —— day of ——, 19—.

Walter C. Peterson, City Clerk, City of Los Angeles, State of California. By —— ——, Deputy.

or

—— ——, Notary Public. In and for the County of ——, State of California.

Instructions:

1. Fill in the above if you are now or ever have been a member of the Communist Party of the United States of America, or the Communist Political Association. Cross out all the statements which do not apply to you. Write the correct dates in the statements which do apply to you.

2. If a Deputy City Clerk is not available, the Affidavit may be acknowledged by a Notary Public who will fill in the Notary Public form above and affix his seal.

[fols. 21-31] EXHIBIT 3 TO PETITION

City of Los Angeles, California
Fletcher Bowron, Mayor

Edmund G. Evans, Personnel Director
Department of Public Works, Personnel Division
590 City Hall, Los Angeles 12
Michigan 5211

December 29, 1948
Registered Mail

Mr. Ray H. Garner,
1127 West 112th Street,
Los Angeles 44, California

Dear Mr. Garner:

Under the provisions of Ordinance No. 94,004, each employee of the City who can truthfully do so, must take and sign an oath of loyalty to the United States. The ordi-

nance sets forth the form of the oath and prescribes January 5, 1949, as the end of the filing period. Within the same period each employee must sign and file an affidavit stating whether or not he is or ever has been a member of the Communist Party or the Communist Political Association.

The Board of Public Works does not wish any employee to fail to sign the oath or the affidavit, either because he has not been given an opportunity to do so or because of any ignorance or misunderstanding as to the requirements, purposes or application of the ordinance.

Your supervisor reports that you were given an opportunity to sign the oath and affidavit but that you stated your refusal to do so. In order that the facts may be clear and without misunderstanding, you are requested to forward to this office a memorandum in writing, stating fully your position in the matter and all of your reasons therefor.

Yours truly,

E. G. Evans, Personnel Director

EGE:sr
Exhibit "3"

[fol. 32-55] EXHIBIT 4 TO PETITION

Los Angeles, Calif., Jan. 3rd, 1949.

Dept. of Public Works.
Personnel Division.
590 City Hall.
Los Angeles, Calif.
% E. G. Evans.

Dear Sir;

In reply to your letter of Dec. 29th, 1948, relative to Ordinance No. 94,004 and my failure to so far sign the loyalty oath, I wish to state that I (with others) have challenged the legality of the ordinance in the courts, so I do not wish to sign, or refuse to sign, pending the outcome of the legal action.

The City Attorney has agreed that no action will be taken in this matter pending the outcome of the court case.

Yours Respectfully, Ray H. Garner, 1127 W. 112th St., Los Angeles 44, Calif.

[fol. 55a] EXHIBIT 5 TO PETITION

Notice of Removal, Discharge or Suspension

Read and strictly comply with the following:

A copy of this statement must be served upon the person removed, discharged or suspended, personally, or by leaving a copy thereof at his or her last known place of residence if he or she can not be found. Service by mail must not be made. After serving, file original with the Board of Civil Service Commissioners. (See Charter provision on reverse side hereof, which must be strictly complied with.)

Los Angeles, Calif., January 6, 1949.

To the Honorable
The Board of Civil Service Commissioners,
11 City Hall, Los Angeles, Calif.

Gentlemen:

You are hereby notified that The Board of Public Works has discharged effective January 7, 1949, Ray H. Garner from the position of Equipment Operator—Code 3525 in the Street Maintenance Division of the City for the following cause (state fully), to-wit: Bureau of Street Maintenance.

Cause I. He failed to take and subscribe to the oath set forth in Section 1 of Ordinance No. 94,004 passed by the Council of the City of Los Angeles on October 21, 1948, as required by the provisions of the said ordinance.

Cause II. He failed to execute an affidavit stating whether or not he was or ever had been a member of the Communist Party of the United States of America or of the Communist Political Association, as required by — in provisions of the said ordinance. Approved Jan. 7, 1949.

Respectfully yours, Board of Public Works, Milton Offner, Secretary.

[fol. 55b-58] Article IX of the City Charter

Sec. 112 (a). Any board or officer having the power of appointment of officers, members and employees in any department of the government of the city, shall have the power to remove, discharge or suspend any officer, member or employee of such department; but no person in the classified civil service of the city, other than an unskilled

laborer employed by the day, shall be removed, discharged or suspended, except for cause, which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, personally, or by leaving a copy thereof at his last known place of residence if he can not be found. Upon such filing such removal, discharge or suspension shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged, or suspended is a fit and suitable person to fill the position from which he was removed, discharged, or suspended, said board shall order said person so removed, discharged or suspended, to be reinstated or restored to duty. The order of said board with respect to such removal, discharge or suspension, shall be forthwith certified to the appointing board or officer, and shall be final and conclusive; provided, that the order of any appointing board or officer suspending any person because of lack of funds in such department shall be final, and shall not be subject to review by said Board of Civil Service Commissioners. If the Board of Civil Service Commissioners shall order that any person removed, discharged or suspended under the provisions of this section be reinstated or restored as above provided, the person so removed, discharged or suspended shall be entitled to receive compensation from the city the same as if he had not been removed, discharged or suspended by the appointing board or officer.

(b) The provisions of this section shall not apply to those members of the Police Department appointed under civil service rules and regulations and sworn in, as provided by law, to perform the duties of regular police officers, nor to those members of the Fire Department appointed

under civil service rules and regulations to perform the duties of regular firemen; notwithstanding anything contained in sections 135 and 202 of this charter, all other employees of both departments shall be subject to the provisions of this section.

[fol. 59] EXHIBIT 6 TO PETITION

City of Los Angeles, California
Fletcher Bowron, Mayor

The Board of Civil Service Commissioners
11 City Hall, Los Angeles 12
Michigan 5211
Joseph W. Hawthorne, General Manager

Commissioners: Samson A. Lindauer, President; Justin W. Gillette, Vice-President; Charles E. Arnn, Ransom M. Callicott, Ida S. Lazard; S. May Smith, Secretary.

March 2, 1949

Mr. Charles J. Katz,
403 West 8th Street,
Los Angeles, California

Dear Sir:

This informs you that in regular session on March 1, 1949, the Board of Civil Service Commissioners took under final consideration appeals from discharge pursuant to provisions of City Ordinance No. 94004 of seventeen city employees, all represented by you at hearings held February 10, 1949, and February 18, 1949.

I am instructed to inform you that in each of the appeals received from the seventeen employees named below the following motion was duly adopted by the Commission:

> "The board having heretofore taken under submission the matter of the discharge of (name of appellant) and having considered the matter and the evidence received therein, the board now finds (1) that the grounds and charges stated for such discharge were and are sufficient and (2) that such grounds and charges [fol. 60] were and are true. It is therefore ordered

" that the said discharge of (name of appellant) be sustained."

Ray H. Garner	Margaret B. Haskell
John R. Brown	Aida L. Beldner
Cornelius Lawrence	Carrie L. Dick
Frank Torreano	Eugene R. Hallett
Harry N. Beckerman	Edward M. Havens
Vera S. Mann	Dana Platt
Ola Ross Pacifico	Eugene E. Reed
Frances Schwartz	Willard R. Smart
Mary E. Grunewald	

Each of the above named individuals is being notified of this action.

Yours very truly,

S. May Smith,
Secretary

SMS: md

[fols. 61-77] EXHIBIT 7 TO PETITION

Los Angeles, Calif.
March 7, 1949

City Clerk,
City of Los Angeles,
Room 195, City Hall,
Los Angeles, Calif.

Dear Sir:

In accordance with Section 112½ of the Charter of the City of Los Angeles I hereby demand my back pay in the approximate amount of $640.00 and any other emoluments which is due me in my position of Equip. Opr. in the Department of Public Works, City of Los Angeles from January 7, 1949 to date, and from now on until my reinstatement or until the final adjudication by the courts of the disputed dismissal together with such wage increases as may go with my position because of any salary adjustments or salary increases due to promotions to which I may be

entitled, together with compensation for any expenses to which I have been put because of my discharge.

Very truly yours,
Ray H. Garner

Subscribed and sworn to before me this 6 day of March, 1949. Miss Frieda Rapoport, Notary Public in and for the County of Los Angeles, State of California. My Commission Expires Sept. 15, 1950.

[fol. 78-96] EXHIBIT 8 TO PETITION

Los Angeles, Calif.
March 7, 1949

Honorable Civil Service Commission,
City of Los Angeles,
Room 11, City Hall,
Los Angeles, Calif.

Gentlemen:

In accordance with Section 112½ of the Charter of the City of Los Angeles, I am submitting this claim to, and making a demand upon, the Board of Civil Service Commissioners of the City of Los Angeles for my reinstatement as Equip. Opr. as a classified civil service employee of the City of Los Angeles. I consider my discharge for failure to sign the oath and affidavit under Los Angeles City Ordinance #94004 by the appointing authority and the ruling of the Civil Service Commission in upholding such discharge to be illegal, wrongful and invalid.

Very truly yours,
(S.) Ray H. Garner

[fol. 97] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

No. 559954

RESPONDENTS' POINTS AND AUTHORITIES UNDER SECTION 1107, CODE OF CIVIL PROCEDURE IN OPPOSITION TO THE GRANTING OF AN ALTERNATIVE WRIT OF MANDATE—Filed May 25, 1949

I

The Petition does not State Facts Sufficient to State a Cause of Action to Support the Issuance of an Alternative Writ of Mandate or to Show that the Petitioners or Any of Them are Entitled to any Relief Whatever as Against any of the Respondents.

Any of the charges stated against the petitioners was obviously sufficient to support the discharge of each of the petitioners. A similar question was before this court in cases of *Steiner* v. *County of Los Angeles* and *Parker* v. *County of Los Angeles*. Appeals were taken in those cases and consolidated for hearing in the District Court of Appeal. The opinion of the District Court affirming the judgments of this court is reported in 88 A.C.A. at page 487. A petition for hearing in the Supreme Court was denied on January 10, 1949. The decision there is determinative of the claims of the petitioners here.

It is well settled that a public employee has no property or contract right in his position, and that no question of [fol. 98] due process arises upon his discharge.

Perez v. *Board of Police Commissioners*, 78 Cal. App. 2d 638,

Risley v. *Board of Civ. Service Comm'ers*, 60 Cal. App. 2d 32,

Christal v. *Board of Police Comm'ers*, 33 Cal. App. 2d 564,

Ludolph v. *Board of Police Comm'ers*, 30 Cal. App. 2d 211,

Boyd v. *Pendergast*, 57 Cal. App. 504.

II

There is a Misjoinder of Parties Plaintiff

In a mandamus proceeding respondents cannot safely demur without answering to the merits of the petition at the same time. Since the issuance of a writ of mandate is an extraordinary remedy and one which is largely within the discretion of the court, it is appropriate that objections to the form of the petition should be suggested to the court at this time. If the petitioners are disposed to file an amended petition in order to meet such objections they may do so, and the respondents are thus not compelled to answer a petition until one is presented which sets forth the claims of the petitioners in such proper form that an answer thereto will clearly establish the issues of fact and of law upon which the case is to be tried.

Seventeen petitioners have here filed a document entitled [fol. 99] "Consolidated Petitions for Writ of Mandate". No authority for such a document can be found in the statutes, and reason suggests none. No doubt it is thought by the petitioners that their joinder is within the provisions of Section 378 of the Code of Civil Procedure because the sufficiency of Cause Two stated against 15 of the petitioners, and of Cause One stated against the other 2 as related on pages 6 and 7 of the petition, is a question common to the complaints of each of the petitioners. It is not enough, however, that there be a question of law or fact common to the cases of all of the plaintiffs who propose to join in an action, because in addition all of the plaintiffs must have an interest in the subject of the action or a right to relief arising out of the same transaction or series of transactions. Neither of these latter conditions exists here. The subject of each petitioner's action is his discharge from his position. None of the petitioners has any interest in the discharge of any of the other petitioners. The relief which each petitioner seeks arises out of his discharge and of the determination by the Board of Civil Service Commissioners, after a hearing in his case, that it would not direct his reinstatement. There is no connection between these transactions in the case of one petitioner and similar transactions in the cases of the other petitioners, except that there was some similarity of form and procedure in each case. Similarity of form does not effect [fol. 100] identity.

Joinder of parties plaintiff is permitted only where there is such a common interest in the subject matter or such identity of the transactions involved. Interest in the subject of the action means a legal or property interest.

Parmeley v. *Boone*, 35 Cal. App. 2d 517.

Peters v. *Bigelow*, 137 Cal. App. 135.

Gartler v. *First National Bank of San Pedro*, 88 Cal. App. 411.

Proper parties, as distinguished from necessary parties, are those without whom a substantial decree may be made, but not one which shall completely settle all of the questions which may be involved in the controversy, and conclude the rights of all the persons who have any interest in the subject matter of the litigation.

Tregear v. *Etiwanda Water Co.*, 76 Cal. 537.

It is evident that a decree in the case of any one of the petitioners would completely settle all of the questions involved in controversy between him and the respondents, and that it would conclude the rights of all the persons who have any interest in the subject matter of such litigation. The other petitioners are therefore not proper parties to join with any of the petitioners in his action.

[fol. 101]

III

The Petition is Ambiguous and Uncertain

The petition incorporates 8 exhibits by reference. Of these Exhibit 3 consists of copies of 13 letters, Exhibit 4 consists of copies of 19 letters, Exhibit 5 consists of copies of 17 Notices of Discharge, Exhibit 7 consists of copies of 17 claims, and Exhibit 8 consists of copies of 17 demands for reinstatement. Comparisons of the several parts of Extion, all employees of the Board of Public Works, but that rather only four of them were employees in the Department of Public Works, seven were employed in the Department of Water and Power, four were employed in the Department of Health and two were employed in the Library Department. This ambiguity raises questions of misjoinder of the respondents as well as possible nonjoinder of necessary respondents, and emphasizes the defects which follow from the failure of the petitioners to set forth their causes of action reparately and from the initial error in joining all of the petitioners in one proceeding.

IV

The Petitioners have Joined Seventeen Causes of Action Without Stating them Separately.

Section 427, Code of Civil Procedure

It is submitted that for the several reasons given the [fol. 102] court should deny the application for the issuance of an alternative writ of mandate.

Respectfully submitted, Ray L. Chesebro, City Attorney; Bourke Jones, Assistant City Attorney; George William Adams, A. L. Lawson and Alan G. Campbell, Deputy City Attorneys, Attorneys for Respondents.

(Title of Cause).

(Affidavit of Service by Mail—1013a, C. C. P.)

STATE OF CALIFORNIA,
County of Los Angeles, ss.

Jean Kill, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is: 405 City Hall, Los Angeles 12, California; that on the 25th day of May, 1949, affiant served the within Respondents' Points and Authorities Under Section 1107, C.C.P. in Opposition of the Granting of an Alternative Writ of Mandate on the Petitioners in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said Petitioners at the office address of said attorney, as follows: [fol. 103] "Charles J. Katz, Attorney at Law, 403 West Eighth Street, Los Angeles 14, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorney for the persons by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

Jean Kill

Subscribed and sworn to before me this 25th day of May, 1949. Sabina M. Ross, Notary Public in and for the County of Los Angeles, State of California. (Seal)

My Commission Expires June 7, 1951.

[Endorsed]: Filed May 25, 1949, Harold J. Ostly, County Clerk, By J. E. Shaw, Deputy.

[fol. 104] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

RAY H. GARNER; HARRY BECKERMAN; AIDA BELDNER; JOHN R. BROWN; Carrie L. Dick; Mary E. Grunewald; Eugene Hallett; Margaret B. Haskell; Edward Havens; Cornelius Lawrence; Vera Mann; Ola Ross Pacifico; Dana Platt; Eugene Reed; Frances Schwartz; Willard Smart; Frank Torreano; Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; Clarence J. Derrick, Joseph O. Donovan, Louis M. Dreves, Frank Gillelen, Edward L. Taylor, and Milton Offner, As Members of the Board of Public Works of the City of Los Angeles; Board of Civil Service Commissioners of the City of Los Angeles; Samson A. Lindauer, Justin W. Gillette, Charles E. Arnn, Ransom M. Callicott, and Mrs. Ida S. Lazard, As Members of the Board of Civil Service Commissioners of the City of Los Angeles; Dan O. Hoye, City Controller of the City of Los Angeles; The City of Los Angeles, a municiual corporation; Respondents.

ORDER DENYING ALTERNATIVE WRIT OF MANDATE

The People of the State of California Send Greetings to:

Board of Public Works of the City of Los Angeles; Clarence J. Derrick, Joseph O. Donovan, Louis M. Dreves, Frank Gillelen, Edward L. Taylor, and Milton Offner, as members of the Board of Public Works of the City of Los Angeles; Board of Civil Service Commissioners of the [fol. 105] City of Los Angeles; Samson A. Lindauer, Justin W. Gillette, Charles E. Arnn, Ransom M. Callicott, and Mrs. Ida S. Lazard, as members of the Board of Civil

Service Commissioners of the City of Los Angeles; Dan O. Hoye, City Controller of the City of Los Angeles; The City of Los Angeles, a municipal corporation, Respondents.

Whereas, it appears to us by the verified consolidated petitions of Ray H. Garner, Harry Beckerman, Aida Beldner, John R. Brown, Carrie L. Dick, Mary E. Grunewald, Eugene Hallett, Maragaret B. Haskell, Edward Havens, Cornelius Lawrence, Vera Mann, Ola Ross Pacifico, Dana Platt, Eugene Reed, Frances Schwartz, Willard Smart, and Frank Torreano, the parties beneficially interested, that an alternative writ of mandate should issue herein and that the petitioners have no plain, speedy or adequate remedy in the course of law, therefore we do command you that immediately upon receipt of this writ you do make an order reinstating each petitioner to the positions from which they were removed, as set forth in paragraph III of said verified consolidated petitions, and to permit each petitioner to perform the duties of his respective position, and to restore to each petitioner all the rights incident to said position, and to cause demands and pay checks to be issued to said petitioners in the amount of salary or wages due from January 7, 1949, at the rates set forth in paragraph III of said verified consolidated petitions, together [fol. 106] with any general wage increases granted to said classifications since January 7, 1949, or that you show cause before this Court at the Courtroom thereof in the City Hall, City of Los Angeles, State of California, on the —— day of ——, 1949, at —— o'clock ——M., in Department —— thereof why you have not done so.

Witness the Honorable —— ——, Judge of this Court, Attest my hand and the seal of said Court this 18 day of May, 1949.

Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles. By —— ——, Deputy Clerk. (Seal Superior Court Los Angeles County.)

Denied May 25, 1949.

Hanson, J.

[Endorsed:] Filed May 25, 1949. Harold J. Ostly, County Clerk. By J. E. Shaw, Deputy.

[fol. 107] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

[Title omitted]

NOTICE OF APPEAL—Filed June 20, 1949

To the Honorable Clarence M. Hanson, Judge of the Above Entitled Court: and

To the Clerk of the Above Entitled Court; and

To Ray L. Chesebro, Esquire, City Attorney, Bourke Jones, Esquire, Assistant City Attorney, George William Adams, Esquire, Deputy City Attorney, A. L. Lawson, Esquire, Deputy City Attorney, and Alan G. Campbell, [fols. 108-113] Esquire, Deputy City Attorney, Attorneys for Respondent:

You, and Each of You, Will Please Take Notice:

That Ray H. Garner, Harry Beckerman, Aida Beldner, John R. Brown, Carrie L. Dick, Mary E. Grunewald, Eugene Hallett, Margaret B. Haskell, Edward Havens, Cornelius Lawrence, Vera Mann, Olda Ross Pacifico, Dana Platt, Eugene Reed, Frances Schwartz, Willard Smart, and Frank Torreano, the petitioners in the above entitled action, hereby appeal to the District Court of Appeal of the State of California, in and for the Second Appellate District, from that certain Order Denying Alternative Writ of Mandate made and entered by the Superior Court of the State of California, in and for the County of Los Angeles, on May 25, 1949, wherein and whereby the petitioners' application for an alternative writ of mandate was denied, and from the whole of said Order.

Dated this 17 day of June, 1949.

Charles J. Katz, Attorney for Petitioners and Appellants.

[File endorsement omitted.]

[fol. 114] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

PETITION FOR HEARING IN SUPREME COURT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the State of California:

Ray H. Garner, *et al.*, petitioners here and plaintiffs-appellants below, respectfully pray that this Honorable Court order that the above entitled case be transferred to the Supreme Court for hearing and decision after decision of the District Court of Appeal, Second Appellate District, Division One, affirming the order of the trial court in favor of respondents upon the ground that a hearing in this Court after decision by said District Court of Appeal is necessary to secure the settlement of important questions of law.

[fol. 115] Statement of the Case

The petitioners here filed their consolidated petitions for writ of mandate [R. 1-96][1] on May 18, 1949, in the Superior Court of Los Angeles County, seeking restoration to their positions in the classified civil service of the City of Los Angeles from which they had been removed for their failure to comply with the provisions of a so-called "loyalty order" adopted by the Council of the respondent City of Los Angeles on October 21, 1948, as City Ordinance Number 94,004 [Ex. 1, R. 18].

The petitioners alleged in their petition for writ of mandate that they had been for many years members of the classified civil service of the City of Los Angeles holding positions ranging from that of tree trimmer in the case of petitioner Eugene Reed to that of equipment operator in the case of petitioner Ray H. Garner [R. 2-4].

On or about October 21, 1948, the petition further alleged, the Council of the City of Los Angeles enacted the aforesaid Ordinance Number 94,004 which became effective December 6, 1948. The said Ordinance required employees of

[1] Record references are to the clerk's certified transcript on appeal.

the City of Los Angeles to subscribe to an oath of loyalty which included among other requirements an affirmation that petitioners had not within a period of five years prior to the effective date of the Ordinance advised, advocated or taught the forcible overthrow of the Government of the United States or of the State of California, and to execute an affidavit of membership or nonmembership in the Communist Party of the United States and the Communist Political Association [Ex. 2, R. 19].

Fifteen of petitioners declined to sign either the oath or affidavit; two of the petitioners, Ola Ross Pacifico and [fol. 116] Frances Schwartz, did sign the oath but not the affidavit. All seventeen were discharged from their civil service employment.

Rule XVII of the respondent Board of Civil Service Commissioners of the City of Los Angeles in effect at all times herein involved provides in pertinent part as follows:

> "* * * but no person in the classified civil service of the city, other than an unskilled laborer employed by the day,[2] shall be removed, discharged or suspended except for cause which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners * * *."

Typical of the written notices of discharge in the cases of the fifteen of the seventeen discharged petitioners is the notice given by the respondent, Board of Public Works, to the petitioner, Garner [Ex. 5, R. 57]:

> "You are hereby notified that the Board of Public Works has discharged, effective January 7, 1949, Ray H. Garner from the position of Equipment Operator-Code 3525 in the Street Maintenance Division, Bureau of Street Maintenance Division, Bureau of Street Maintenance of the City for the following cause (state fully), to wit:
>
> "Cause I. He failed to take and subscribe to the oath set forth in Section 1 of Ordinance No. 94,004

---

[2] None of the petitioners was such an unskilled laborer employed by the day. [See paragraph III, R. 2, 3, and 4.]

passed by the Council of the *State* of Los Angeles on October 21, 1948, as required by the provisions of the said ordinance.

[fol. 117] "Cause II. He failed to execute an affidavit stating whether or not he was or ever had been a member of the Communist Party of the United States of America or of the Communist Political Association, as required by the provisions of said ordinance."

In the case of the two remaining petitioners, Ola Ross Pacifico and Frances Schwartz, the ground of discharge is limited to the failure to execute the affidavit stating whether she was or ever had been a member of the named political party, and the failure to execute such affidavit notwithstanding direction to do so [R. 58].

No other ground for discharge of any petitioners was ever asserted or claimed. Following hearings before the Board of Civil Service Commissioners held on February 10 and February 18, 1949, that Board on March 2, 1949, by one notice addressed to counsel for all seventeen petitioners, sustained each and all of the discharges [see Ex. 6, R. 59-60].

Thereupon and within the time prescribed by the City Charter, each petitioner filed a claim for unpaid salaries with the City Clerk [Ex. 7, R. 61-77, incl.] and an application for reinstatement. On or about March 15, 1949, both the request for unpaid salary and the application for reinstatement were denied by respondents in purported pursuance of Ordinance Number 94,004 [R. 9-10, par. X].

It is alleged in the verified petition and not denied that

"but for the matter of asserted failure to comply with the provisions of Ordinance Number 94,004, petitioners each performed the services required of him in a competent and satisfactory manner; and petitioners were at all times herein mentioned fit and suitable persons to fill the positions from which they were removed." [R. 10, par. X.]

[fol. 118] The petition for the issuance of an alternative writ of mandate was denied on May 25, 1949, by the Honorable Clarence M. Hanson, Judge of the Los Angeles Superior Court, without opinion [R. 104-106]. On July 19, 1950, the order was affirmed by the District Court of Appeal, Second Appellate District, Division One. The opinion is

reported in 98 A. C. A. 694 and is set forth at length in the appendix annexed to this petition. Since substantial legal issues raised in the briefs were not considered in the opinion of the District Court of Appeal, a petition for rehearing was filed setting forth the failure to consider such issues. The petition for rehearing was denied on August 8, 1950.

Questions Presented

1. Whether in the light of the decision of the United States Supreme Court in *Parker and Steiner* v. *County of Los Angeles*, this Court should finally determine the same fundamental constitutional questions there involved and which are raised here by the enactment of the City of Los Angeles loyalty ordinance.

2. Whether the provisions of Ordinance No. 94,004 requiring the employees of the City of Los Angeles to execute an expurgatory test oath violate the due process guarantees of the State and Federal Constitutions.

3. Whether the provisions of Ordinance No. 94,004 constitute an *ex-post facto* law and bill of attainder in violation of the applicable provisions of the State and Federal Constitutions.

4. Whether the requirements of the loyalty oath imposed upon employees in the classified civil service of the City of Los Angeles constitute unlawful burdens and conditions in violation of the rights guaranteed to them as citizens [fol. 119-121] and public employees by the State and Federal Constitutions.

5. Whether the provisions of Ordinance No. 94,004 deprive the petitioners of freedom of speech, press and assembly and the right to petition for redress of grievances in violation of the applicable provisions of the State and Federal Constitutions.

6. Whether Ordinance No. 94,004 was lawfully enacted by the City Council of the City of Los Angeles.

[fols. 122-125]

Argument

I

The Decision of the United States Supreme Court in Parker and Steiner Against County of Los Angeles Returning the Loyalty Order Cases to the Court of California for Decision Emphasizes the Importance of the Constitutional

Issues Here Involved and the Need for a Final Determination by This Court of the Validity of the So-called Loyalty Ordinance Enacted by the City of Los Angeles.

[fols. 126-134] II

The Provisions of the Ordinance Deprive the Petitioners of Substantive and Procedural Due Process of Law in Violation of Article VI, Section 3, and the Fourteenth Amendment to the Constitution of the United States; Article I, Section 13, and Article XX, Section 3, of the Constitution of the State of California; and Sections 100, 103, and 112 of the Charter of the City of Los Angeles.

[fols. 135-140] III

The Ordinance Constitutes a Bill of Attainder and Ex Post Facto Law in Violation of Article I, Section 10, of the Constitution of the United States and Article I, Section 16, of the Constitution of California.

[fols. 141-150] IV

The Provisions of the Ordinance Affecting Civil Service Employees in the City of Los Angeles Deprives the Petitioners of Their Liberty and Property Without Due Process of Law and the Equal Protection of the Laws in Violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 1, 13, 21 and 23, of the Constitution of the State of California.

[fols. 151-158] V

The Ordinance Is a Compulsory Loyalty Test Oath and Deprives Petitioners of Freedom of Speech, Press, Assembly, Association and the Guarantees of a Republican Form of Government in Violation of Article IV, Section 4, and the First, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 1, 2, 3, 9, 10, 21 and 23, of the Constitution of the State of California.

[fols. 159-163] VI

Ordinance No. 94,004 Was Passed by the City Council of Los Angeles Alone. It Was Neither Adopted by the Legislature of the State of California, Nor by Initiative

Petition Signed by Fifteen Per Cent of the Registered Electors of the City. Since Ordinance No. 94,004 Amends the Charter of the City of Los Angeles, and Since It Was Not Adopted in the Manner Established by Article XI Section 8, Subdivision (h), of the State Constitution for the Adoption of Charter Amendments, It Is Void.

[fol. 164] APPENDIX

OPINION OF THE DISTRICT COURT OF APPEAL

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

Ray H. Garner, *et al.*, Petitioners and Appellants, vs. Board of Public Works of the City of Los Angeles, *et al.*, Respondents. Civil No. 17411.

Filed Jul. 19, 1950.

Appeal from an order of the Superior Court of Los Angeles County denying alternative writ of mandate, Clarence M. Hanson, Judge.

For Appellants: Charles J. Katz.

For Respondents—Ray L. Chesebro, City Attorney; Bourke Jones, Assistant City Attorney, George William Adams, A. L. Lawson, and Alan G. Campbell, Deputy City Attorneys.

The City of Los Angeles adopted an ordinance, in part as follows:

"An Ordinance to effectuate the provisions of Charter Section 432 and otherwise to insure the loyalty of the officers and employees of this City.

"The People of the City of Los Angeles Do Ordain as Follows:

"Section 1. Every person who is hereafter elected or appointed to an office or position in the service of the City of Los Angeles must, before entering upon the duties of his office or position, take and subscribe to the following oath:

"I, ..., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United [fol. 165] States of America and the State of California, and will support and defend the Constitution and laws of the United States of America and of the State of California and the laws of the City of Los Angeles against all enemies, foreign and domestic. I further swear (or affirm) that I do not advise, advocate or teach, and have not within the

period beginning five (5) years prior to the effective date of the ordinance requiring the making of this oath or affirmation, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California and that I am not now and have not, within said period, been or become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of California. I further swear (or affirm) that I will not, while I am in the service of the City of Los Angeles, advise, advocate or teach, or be or become a member of or affiliated with any group, association, society, organization or party which advises, advocates or teaches, or has within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California, that I will well and faithfully discharge the duties of my office or employment in the service of the City of Los Angeles and that I take this whole obligation freely without any mental reservation or purpose of evasion, So Help Me God.

"Sec. 2. Every person who now holds or occupies an office or position in the service of the City of Los Angeles [fol. 166] must, within thirty (30) days after the effective date of this ordinance, or if he be on leave or under suspension for cause from the service of the city at such effective date, within thirty (30) days after his return to such service, take and subscribe to the oath set forth in Section 1 hereof.

"Sec. 3. Every person who is hereafter elected or appointed to an office or position in the service of the City of Los Angeles must, before entering upon the duties of his office or position, execute an affidavit stating whether or not he is or ever was a member of the Communist Party of the United States of America or of the Communist Political Association, and if he is or was such a member, stating the dates when he became, and the periods during which he was, such a member; provided, however, that no additional affidavit shall be required on account of the transfer, demotion or promotion of any person who has once executed an affidavit under this section or under Section 4 hereof.

"Sec. 4. Every person who now holds or occupies an office or position in the service of the City of Los Angeles, must, within thirty (30) days after the effective date of this ordinance, or if he be on leave or under suspension for cause from the service of the city at such effective date, within thirty (30) days after his return to such service, execute an affidavit stating the facts required to be stated in the affidavit required by Section 3 of this ordinance."

Seventeen employees of the city refused to comply with the ordinance, and were discharged. They filed in the Superior Court their consolidated petitions for writ of mandate directing reinstatement and payment of salaries [fol. 167] from the date of their discharge. The court denied the petition, and petitioners appeal to this Court.

The issues involved in this case have been set forth and disposed of in Steiner v. Darby, 88 Cal. App. 2d 481, 1948. (Hearing denied by the Supreme Court, Jan. 10, 1949.)

No good purpose would be served in repeating the reasoning so clearly and logically stated by Mr. Justice McComb in the Steiner case. In that case the law as developed to its date of decision is stated and applied.

Since then, so far as brought to our attention, the principles here involved have been before the courts in the following cases:

Lawson v. United States, 176 F. 2d 49.

In that case the United States Court of Appeals for the District of Columbia Circuit held that questions by a Congressional Committee to script writers for motion pictures whether they were or were not communists were pertinent and proper; therefore contumacious witnesses were not protected by the Bill of Rights from answering.

L'Hommedieu *et al.* v. Board of Regents of the University of the State of New York, 95 N. Y. S. (2d) 443.

In that case the Supreme Court, Appellate Division, Third Department, of the State of New York held that a statute which provides for dismissal from the public school system of members of subversive organizations does not violate due process of law, nor does it infringe upon the freedoms of speech, press, or assembly.

In that case it is said:

"There is no constitutional right to be a teacher any more than there is to be a public official or a member of any of the professions. No one has a constitutional right [fol. 168] to advocate the overthrow of the government by

force and violence. The courts have held time and time again that the freedoms guaranteed by the Constitution are not absolute but must yield to the public welfare. (Page 451.)

* * * * * * *

"The most important qualification of a teacher is loyalty to our government. It necessarily follows that disqualification is advocacy of the overthrow of that government. The statute under review is a law dealing with public employment of teachers in our public schools. To avail oneself of the privilege of teaching certain qualifications must be possessed, certain rights renounced. This is not an unconstitutional classification. (Citing cases.)

"When it comes to loyalty to our government, the affirmation of loyalty, the denial of disloyalty, renunciation of membership in organizations advocating overthrow of our government or subscribing to subversive tenets, all have been upheld as qualifications of public employment or of holding office in organizations availing themselves of statutory privileges. (Citing cases.) (Pages 452-453.)

* * * * * * *

" 'The Constitution,' said the United States Supreme Court in U. S. *ex rel.* Milwaukee Social Democratic Pub. Co. 1. Burleson, 255 U. S. 407, 414, 41 S. Ct. 352, 355, 65 L. Ed. 704, 'was adopted to preserve our government, not to serve as a protecting screen for those who, while claiming its privileges, seek to destroy it.' A contemporary statement of the same principle is found in Barsky v. United States, 83 U. S. App. D. C. 127, 167 F. 2d 241; certiorari denied 334 U. S. 843, 68 S. Ct. 1511, 92 L. Ed. 1767."
[fol. 169] American Communications Asso. v. Douds, 94 L. Ed. Advance Opinions 597.

In that case, decided May 8, 1950, the United States Supreme Court upheld the constitutionality of subsection 9 (h) of the Labor Management Relations Act of June 23, 1947. (29 U. S. C. A. sec. 159(h).) This section denies labor unions the right to present cases to the National Labor Relations Board unless there is on file with the Board "* * * an affidavit executed contemporaneously or within the preceding twelvemonth period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate

or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

The following comments by the Court are applicable to the case at bar:

"* * * If accidents of birth and ancestry under some circumstances justify an inference concerning future conduct, it can hardly be doubted that voluntary affiliations and beliefs justify a similar inference when drawn by the legislature on the basis of its investigations. (Page 604.)

"* * * The exercise of particular First Amendment rights may fly in the face of the public interest in * * * Government's obligation to provide an efficient public service * * *. (Page 608.)

* * * * * * *

[fol. 170] "We have previously had occasion to consider other statutes and regulations in which the interests involved were, in large measure, like those now being considered. In United Public Workers v. Mitchell, 330 U. S. 75, 91 L. Ed. 754, 67 S. Ct. 556, *supra*, we upheld a statute which provided that employees of the Federal Government could not participate in partisan political activities, concededly a First Amendment right, if they would retain their positions. The decision was not put upon the ground that government employment is a privilege to be conferred or withheld at will. For it was recognized that Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take active part in missionary work.' 330 U. S. at 100. But the rational connection between the prohibitions of the statute and its objects, the limited scope of the abridgement of First Amendment rights, and the large public interest in the efficiency of government service, which Congress had found necessitated the statute, led us to the conclusion that the statute may stand consistently with the First Amendment." (Page 612.)

In the present case Petitioners fail to understand that loyalty is indispensably necessary in the employer-employee relationship between the state and its servants. It is

treasonable to advocate the destruction by force of the government for which one works. It is an ever-present threat to government itself to have treasonable persons charged with the conduct of public affairs. Having such people on the payroll results in impairment of governmental service. In times of national stress it would seriously affect the functioning of government. It is, therefore, the duty of those charged with the management of the [fol. 171] business of government to ascertain, require, and insure unconditional, unswerving loyalty of every servant of the people, high or low.

One of the foundation stones of private business is that the employee must be loyal to his employer. Loyalty is implicit in the contract of hiring. No private business can long succeed without the conscientious, undivided support of its employees. The man or woman who denies allegiance to his employment is, and should be, soon separated from it. Nemesis with a club waits for him around the corner. And, so long as the employment continues, every employer has the right at any time to ask his employee to declare his loyalty.

"But," say some of the Petitioners, "we're loyal. We will take the oath to defend and support the Constitution of the United States and of the State of California. What we object to is that we are required, under oath, to express our beliefs; it inquires into our thinking today, our thinking tomorrow."

A paragraph from a letter of one of the Petitioners reads as follows:

"It violates the right of every individual to free political association, singling out the Communist Party and saying, in effect, that no city worker has a right to belong to it. Not that it says so specifically. But every worker who signs the oath and affidavit knows by the mere *juxte* position (*sic*) of the three questions, *Loyalty, Force-and-Violence, Communist Party,* that membership in the latter [fol. 172] is considered evidence of disloyalty and shows the desire to overthrow the government by force and violence 'or other unlawful means.' Actually, according to Supreme Court decision, the Communist Party is a legally constituted party entitled to all the electoral privileges accorded any other legal party. My employer, the City of Los Angeles, has no right to ask me whether or not I belong to the Communist, the Republican, the Demo-

cratic, or the Prohibition Party. My party affiliations, according to the Constitution of the United States, are strictly my own affair."

It is an interesting question whether the legislative power may require disclosure or disavowal of mere beliefs or opinions, without overt acts. The argument may be followed extensively in the dissenting and concurring opinion of Mr. Justice Jackson in American Communications Asso. v. Douds, *supra*.

That question is not present in this case. The ordinance under consideration does not call for beliefs. It provides that one must **over** whether or not he is or ever was a member of the Communist party or the Communist Political Association; that he has not within five years advocated the overthrow of the government by force, violence, or unlawful means; that he is not and has not been a member of any group, society, association, organization, or party which advises or teaches overthrow of the government by such means; and that while he is in the service of the City he will not belong to or become a member of any such [fol. 173] group, or advocate or teach such subversive doctrines.

The right of the people of the State of California have their employees declare their allegiance to the state, that they are not its enemies, and do not advocate or believe in destroying the state by force, violence, or unlawful means, is not trammeled, infringed, or denied by any constitutional provision, by natural justice, or by common sense. The ordinance before this Court, adopted by a subdivision of state government, is well within the legislative power, and a timely and proper exercise thereof.

The order is affirmed.

Drapeau, J.

We concur: White, P. J.; Doran, J.

[fol. 174] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 175] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Bank

GARNER

v.

BOARD OF PUBLIC WORKS, ETC.

ORDER DENYING HEARING

After Judgment by District Court of Appeal 2nd District, Division 1, No. 17411

Petitioners' application for hearing Denied.

Gibson, C. J., Carter, J., and Traynor, J. voting for a hearing.

Gibson, Chief Justice.

Filed Sept. 13, 1950.

William I. Sullivan, Clerk. By —— —— S. F. Deputy.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 17th day of October A. D. 1950.

William I. Sullivan. By Henry C. Crabtree, Deputy Clerk. (Seal.)

[fol. 176] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

Number ——

RAY H. GARNER; ET AL., Petitioners,

vs.

BOARD OF PUBLIC WORNS OF THE CITY OF LOS ANGELES; ET AL., Respondents

STIPULATION RE PRINTING OF THE RECORD

In accordance with the provisions of Rule 38, (8) of this Court, It is hereby stipulated between the attorneys for

the parties in the above entitled action, that the entire record certified to this Court by the Clerk of the District Court of Appeal of the State of California, Second Appellate District, be printed, except the following:

1. Page 22 through page 31.
2. Page 33 through page 55.
3. On page 56, print only first Notice of Removal, Discharge or Suspension to Ray H. Garner.
4. Pages 57 and 58.
5. Page 62 through page 77.
6. Page 79 through page 95.
7. Page 109 through page 113.
8. Page 119, beginning with the words "Summary of Argument" through page 121.
9. Page 122, beginning with the words "In *Steiner v. Darby*", through page 125.
10. Page 126, beginning with the words "Ordinance Number", through page 134.
11. Page 135, beginning with the words "The Ordinance", through page 140.

[fol. 177] 12. Page 141, beginning with the words "The effectiveness of" through page 150.

13. Page 151, beginning with words "Ours is the accusatorial" through page 158.
14. Page 159, beginning with the words "The Charter of the City", through page 163.

Dated November 14, 1950.

Charles J. Katz, Attorney for Petitioners.

——, 19—. Ray L. Chesebro, City Attorney. By Alan G. Campbell, Deputy.

——— ——, Attorney for Respondents.

[fol. 178] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 453

ORDER ALLOWING CERTIORARI—Filed March 5, 1951

The petition herein for a writ of certiorari to the District Court of Appeal of the State of California, Second Appellate District, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 453

RAY H. GARNER, HARRY BECKERMAN, AIDA BELDNER, JOHN B. BROWN, CARRIE L. DICK, MARY E. GRUNEWALD, EUGENE HALLETT, MARGARET B. HASKELL, EDWARD HAVENS, CORNELIUS LAWRENCE, VERA MANN, OLA ROSS PACIFICO, DANA PLATT, EUGENE REED, FRANCES SCHWARTZ, WILLARD SMART, FRANK TORREANO,

Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; CLARENCE J. DERRICK, JOSEPH O. DONOVAN, LOUIS M. DREVES, FRANK GILLELEN, EDWARD L. TAYLOR, AND MILTON OFFNER, AS MEMBERS OF THE BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; SAMSON A. LINDAUER, JUSTIN W. GILLETTE, CHARLES E. ARNN, RANSOM M. CALLICOTT, AND MRS. IDA S. LAZARD, AS MEMBERS OF THE BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; DAN O. HOYE, CITY CONTROLLER OF THE CITY OF LOS ANGELES; THE CITY OF LOS ANGELES, A MUNICIPAL CORPORATION,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

JOHN T. MCTERNAN,
112 West Ninth Street,
Los Angeles 15, California,
Counsel for Petitioners Garner, et al.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinions below	2
Jurisdiction	2
Statute involved	3
Statement of the matter involved	3
Questions presented	6
Reasons for granting the writ	6
Conclusion	22
Appendix—Ordinance Number 94,004	23

Table of Cases Cited

Alexander v. *United States*, 181 F. 2d 480 (C.C.A. 9th, 1950)	13
American Communications Association v. *Douds*, 339 U. S. 383	8, 13
American Railway Express Co. v. *Levee*, 263 U. S. 19	2
Bailey v. *Alabama*, 219 U. S. 219	14
Boyd v. *United States*, 116 U. S. 616	12
Bridges v. *Wixon*, 326 U. S. 135	21
Campbell, In re, 64 Cal. App. 300, 221 P. 952	11
Chambers v. *Florida*, 309 U. S. 227	19
Chesapeake & O. R. R. Co. v. *Mihas*, 280 U. S. 102	2
Cramer v. *United States*, 325 U. S. 1	18
Cummings v. *Missouri*, 4 Wall. (U. S.) 277	9, 10, 16
Fletcher v. *Peck*, 6 Cranch (U. S.) 87	14
Garland, Ex parte, 4 Wall. (U. S.) 333	10
Green v. *Shumway*, 39 N. Y. 418, 36 How. Pr. 5	10
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Manley v. *Georgia*, 279 U. S. 1	14
Marsh v. *Alabama*, 326 U. S. 501	16
McFarland v. *American Sugar Refining Co.*, 241 U. S. 79	10, 15
Minersville School District v. *Gobitis*, 310 U. S. 586	16

Page

Morrison v. *California*, 291 U. S. 82 14
Ogden v. *Saunders*, 12 Wheat. (U. S.) 213 11
Parker v. *County of Los Angeles*, 337 U. S. 929; 338 U. S. 327 ..... 2, 5, 6
Pierce v. *Carskadon*, 16 Wall. (U. S.) 234 10
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Steiner v. *County of Los Angeles*, 337 U. S. 929; 338 U. S. 327 6
Thornhill v. *Alabama*, 310 U. S. 88 21
Tot v. *United States*, 319 U. S. 463 15
United Public Workers v. *Mitchell*, 330 U. S. 75 16
United States v. *Ballard*, 322 U. S. 78 21
United States v. *Dennis*, 183 F. 2d 201 (C.C.A. 2d 1950) 13
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Western & Atl. R. R. Co. v. *Henderson*, 279 U. S. 639 14
Western Union Tel. Co. v. *Priester*, 276 U. S. 252 2
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Page

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STATUTES AND RULES CITED

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California Constitution, Art. VI, Sections 4 and 4c ... 2
California Rules on Appeal, Rules 28 and 29 ... 2
Constitution of the United States:
First Amendment ... 6, 8, 15
Fourteenth Amendment ... 6, 8, 15
Article I, Section 10 ... 6, 9
Los Angeles City Charter, Section 100 ... 16
Rule XVII, Board of Civil Service Commissioners, City of Los Angeles ... 4
28 U.S.C. 1257 (3) ... 3
28 U.S.C. 2101 (c) ... 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 453

RAY H. GARNER, HARRY BECKERMAN, AIDA BELDNER, JOHN B. BROWN, CARRIE L. DICK, MARY E. GRUNEWALD, EUGENE HALLETT, MARGARET B. HASKELL, EDWARD HAVENS, CORNELIUS LAWRENCE, VERA MANN, OLA ROSS PACIFICO, DANA PLATT, EUGENE REED, FRANCES SCHWARTZ, WILLARD SMART, FRANK TORREANO, *Petitioners,*

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; CLARENCE J. DERRICK, JOSEPH O. DONOVAN, LOUIS M. DREVES, FRANK GILLELEN, EDWARD L. TAYLOR, AND MILTON OFFNER, AS MEMBERS OF THE BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; SAMSON A. LINDAUER, JUSTIN W. GILLETTE, CHARLES E. ARNN, RANSOM M. CALLICOTT, AND MRS. IDA S. LAZARD, AS MEMBERS OF THE BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; DAN O. HOYE, CITY CONTROLLER OF THE CITY OF LOS ANGELES; THE CITY OF LOS ANGELES, A MUNICIPAL CORPORATION, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decision and judgment of the California District Court of Appeal, Second Appellate District, (R. 40) affirming the

order of the Superior Court of the State of California, in and for the County of Los Angeles, which denied petitioners' consolidated petitions for writ of mandate (R. 32-3). A petition for rehearing in the District Court of Appeal was denied (R. 38). The Supreme Court of California denied petitioners' application for a hearing, three Justices voting in favor of granting such a hearing (R. 47).

Opinions Below

The Superior Court rendered no opinion. The opinion of the District Court of Appeal (R. 40-46) is reported in 98 Advance California Appellate Reports 694. The Supreme Court of California rendered no opinion in entering its order denying a hearing (R. 47).

Jurisdiction

The judgment of the District Court of Appeal was entered July 19, 1950 (R. 40). The order of the Supreme Court of California denying a hearing was entered September 13, 1950 (R. 47).

The constitutional issues here presented were argued in the trial court (R. 7-9); they were argued before the District Court of Appeal on appeal (R. 40-46), and on petition for rehearing (R. 38); and they were argued before the Supreme Court of California (R. 35-40) which Court declined to grant a hearing thereon (R. 47).[1]

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[1] Under California law a hearing in the State Supreme Court after a decision in the District Court of Appeal is discretionary with the State Supreme Court (Calif. Const, Art. VI, Secs. 4 and 4c; Rules 28 and 29, Rules on Appeal for the Supreme Court and District Court of Appeal of the State of California). Petitioners applied for hearing on this case and their application was denied (R. 47). This Court's writ is properly directed, therefore to the District Court of Appeal (*Randall* v. *Board of Commissioners*, 252 U. S. 22; *American Railway Express Co.* v. *Levee*, 263 U. S. 19; *Western Union Telegraph Co.* v. *Priester*, 276 U. S. 252; *Chesapeake and Ohio R. Co.* v. *Mihas*, 280 U. S. 102; *Parker* v. *County of Los Angeles*, 337 U. S. 929.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) and 2101 (c).

Statute Involved

The issues presented in this case arise out of a compulsory oath and affidavit required of all city employees, as a condition of continued employment, by the City of Los Angeles. The contents of the oath and affidavit are embodied in Ordinance Number 94,004 adopted by the Council of the City of Los Angeles on October 21, 1948 (R. 11) set forth at length in the Appendix annexed hereto.[2]

Statement of the Matter Involved

There are no disputed issues of fact. The decision of the District Court of Appeal overruled the petitioner's claims that the Ordinance deprived them of federal rights guaranteed by the Constitution of the United States (R. 40-46).

The petitioners' consolidated petitions (R. 1-27) sought restoration to their positions in the classified civil service of the City of Los Angeles from which they had been removed for their failure to comply with the requirements of the Ordinance.

Petitioners are citizens of the United States (R. 1) and permanent civil service employees of the respondent, City of Los Angeles (R. 2). The petitioners have been members of the classified civil service for many years holding positions ranging from that of tree trimmer in the case of petitioner Reed to that of equipment operator in the case of petitioner Garner (R. 2).

On or about October 21, 1948 the Council of the City of Los Angeles enacted the Ordinance herein (R. 3). The said Ordinance required employees of the City of Los Angeles to subscribe to an oath of loyalty which included,

[2] Referred to hereafter as "the Ordinance."

among other requirements, an affirmation that petitioners had not within a period of five years prior to the effective date of the Ordinance advised, advocated or taught the forcible overthrow of the Government of the United States or of the State of California, or been members of organizations which so advocated, and to execute an affidavit of past and present membership or non-membership in the Community Party of the United States or the Communist Political Association (R. 18-21).

Fifteen of the petitioners declined to sign either the oath or affidavit (R. 4-5); two of the petitioners, Ola Ross Pacifico and Frances Schwartz, did sign the oath but not the affidavit (R. 5). All seventeen were discharged from their civil service employment (R. 4).[3]

The sole ground for discharge was the failure to execute the required oath and affidavit, and in the case of the petitioners Pacifico and Schwartz, the sole ground for discharge was the failure to execute the required affidavit (R. 4-5). No other ground for discharge of any petitioners was ever asserted or claimed.

Following hearings before the respondent Board of Civil Service Commissioners held on February 10 and February 18, 1949, that Board on March 2, 1949, by one notice addressed to counsel for all seventeen petitioners, sustained each and all of the discharges (R. 25-26).

Each petitioner duly filed a claim for unpaid salaries and an application for reinstatement (R. 6). On or about March 15, 1949 both the request for unpaid salary and the appli-

[3] Rule XVII of the respondent Board of Civil Service Commissioners of the City of Los Angeles provides in part as follows: ". . . but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners. . . ." None of the petitioners was such an unskilled laborer employed by the day.

cation for reinstatement were denied by respondents pursuant to the Ordinance (R. 6).

It is alleged in the verified petition and not denied that "but for the matter of asserted failure to comply with the provisions of Ordinance Number 94,004, petitioners each performed the services required of him in a competent and satisfactory manner; and petitioners were at all times herein mentioned fit and suitable persons to fill the positions from which they were removed." (R. 6)

As above stated, the petition for writ of mandate was denied by the trial court without opinion; the order of denial affirmed by the District Court of Appeal, Second Appellate District, with opinion; and a petition for hearing denied by the Supreme Court without opinion, three Justices dissenting.

The decision of the court below (R. 40-46) stressed that the "issues involved in this case have been set forth and disposed of in *Steiner* v. *Darby*, 88 Cal. App. 2d 481" (R. 42).[4] The court declared that "one of the foundation stones of private business is that the employee must be loyal to his employer" (R. 45) and that "so long as the employment continues, every employer has the right at any time to ask his employee to declare his loyalty" (R. 45). The court felt that "it is an interesting question whether the legislative power may require disclosure or disavowal of mere beliefs or opinions, without overt acts" (R. 46). The court concluded that the enactment of the Ordinance was constitutionally within the legislative competence.

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[4] The court below made no mention of the grant of certiorari by this Court in the *Steiner* case, and the companion case, *Parker* v. *County of Los Angeles*, 337 U. S. 929, nor the decision of this Court after argument in the said *Parker* and *Steiner* cases, 338 U. S. 327.

Questions Presented

1. Whether, on its face or as applied in this case, the Ordinance constitutes a bill of attainder and ex-post facto law in violation of Article I, Section 10 of the Constitution.

2. Whether, on its face or as applied in this case, the Ordinance deprives petitioners of the liberties of freedom of thought, speech, assembly, association, the right to privacy of conscience, and the right to petition for redress of grievances, without due process of law in violation of the First and Fourteenth Amendments to the Constitution.

Reasons for Granting the Writ

The questions presented in this proceeding raise the same issues as those which were before this Court, but left undecided in the companion cases, *Parker* v. *County of Los Angeles* and *Steiner* v. *County of Los Angeles*, 337 U.S. 929; 338 U.S. 327. The respondent conceded that the questions involved herein were similar to those involved in the Parker and Steiner cases (R. 28), and emphasis on the similarity of the issues was also placed by the court below (R. 42).

This Court granted certiorari in the Parker and Steiner cases (337 U.S. 929) because on the showing before the Court, "serious questions seemed raised as to the scope of a State's power to safeguard its security with due regard for the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment." 338 U.S. 327, 329.

In dismissing the writs of certiorari in the Parker and Steiner cases, this Court noted, after argument, that the "constitutional questions which brought these cases here are not ripe for decision" (338 U.S. 327, 333) because threatened sanctions had not been imposed and because the California courts had not had the opportunity to pass

upon the claims of petitioners in the event such sanctions were imposed.

None of the factors which led this Court to postpone its decision of the constitutional questions raised in the Parker and Steiner cases is present here. This case is "ripe for decision". The issues raised herein are concededly the same which prompted this Court to grant certiorari in the Parker and Steiner cases. Sanctions have been imposed and explicitly because of refusal to comply with the loyalty oath and affidavit requirements of the Ordinance. All state administrative and judicial remedies have been exhausted. The time to which this Court adverted in the Parker and Steiner cases (p. 332) "for the petitioners to urge denial of a Federal right after the State courts have definitively denied their claims under State law" has arrived.

The court below, in sustaining the power of the City to impose on all its employees the compulsory oath and affidavit over the claims of those employees that they are thereby deprived of fundamental constitutional rights, has decided federal questions of the greatest import which this Court has never determined, and has decided those questions in a manner inconsistent with the principles contained in the decisions of this Court which bear most closely thereon.

The Ordinance punishes and stigmatizes employees for their past opinions and associations. It imposes a political test oath upon employees while in office, compelling them upon pain of dismissal to swear under oath whether or not they have ever been members of the Communist Party of the United States of America or the Communist Political Association, or members of any group or organization which in the past five years advised, advocated or taught the forcible overthrow of the government. The Ordinance

interdicts a class of persons without judicial process and subjects them to serious pains and disabilities. The measure constitutes a bill of attainder. Similar enactments have been uniformly condemned by this Court. Contrary to the view of the court below, the decision by this Court in *American Communication Association* v. *Douds*, 339 U.S. 382 lends no support to the validity of the Ordinance involved herein.

The instant case does not involve the power of a court to supervise the conduct of legislative inquiries nor the power of a legislature to impose conditions for the use of an instrumentality created by the legislature. What is involved here is the power of a municipality to impose a compulsory test oath upon employees in the classified civil service whose performance of their duties as to ability, experience and integrity is not questioned.

The provisions of the Ordinance on their face, and as applied in this case, offend the First and Fourteenth Amendments in that by their very terms they operate directly and specifically on exercises of freedom of thought, speech, assembly and association. The compulsory expression of loyalty required by the Ordinance is contrary to the express guaranties of liberty contained in the Constitution. The City of Los Angeles, and all its officials, are subject to the terms of the fundamental law.

The Ordinance here does not prescribe standards of experience, ability and honesty for its employees. It is not a measure which is devised or intended to preserve the integrity of its civil service system or the independence of its employees. In substance and effect, the Ordinance is a coercive measure, unlawfully imposing political conditions upon citizens in government employ whose ability and integrity are not in dispute. In actual effect, it is the Ordinance which undermines the security of the State

for it abridges basic freedoms upon which the foundations of democratic government rest. The greatest danger to the State is servility of mind.

This Court, it is respectfully submitted, should finally decide these serious constitutional questions. They affect not merely the rights of residents of the City of Los Angeles, but the rights of more than one-tenth of the nation's employed population.[5] Measures similar to the Ordinance here affecting the freedoms of government employees are either presently in force or in immediate contemplation in all parts of the nation (Our Uncertain Liberties, U.S. Liberties, 1947-1948, American Civil Liberties Union, Annual Report, N.Y., p. 23). The resultant conflicts which have arisen and continue to arise between the claims of citizens and the claims of government under the Constitution should be resolved by this Court.

I. The Ordinance is a bill of attainder and ex post facto law imposing punishment by legislative fiat and without judicial trial in violation of article I, Section 10 of the Constitution.

In *Cummings* v. *Missouri*, 4 Wall. (U.S.) 277, this Court stated (p. 325): "The Constitution deals with substance, not shadows. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

The petitioners have not been discharged because of misconduct in office. Their qualifications for the avoca-

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[5] In July, 1948, 5,596,000 persons were employed by either federal, state or local governments out of a total of 60,312,000 employed throughout the nation. "Survey of Current Business," Department of Commerce, Bureau of Census (1948).

tions which they pursue are not in dispute. The Ordinance here reaches the person; not the calling. The legislative body of the City of Los Angeles has declared (there are no "findings") that citizens in its employ must swear under oath whether or not they have ever been in the past members of specified organizations, the Communist Party of the United States or the Communist Political Association, or whether in the past five years, they were members of organizations which advocated the forcible overthrow of government. Failure to take the oath, and for that reason alone, means discharge from employment, with resultant stigmatization of reputation and serious impairment of the chance to earn a living.

In a long line of decided cases by this Court and various state courts, the following propositions appear to be firmly established: (a) a statute which embodies a legislative declaration or presumption of guilt against a specified organization or class of persons and provides penalties against the designated group, is a bill of attainder; (b) to constitute a bill of attainder it is not necessary that specific individuals or particular organizations be designated by name but it is sufficient if they are described in general terms clear enough to identify them as members of a proscribed group; (c) to violate the constitutional prohibition it is not necessary that the sanctions and penalties be imposed absolutely but it suffices if punishment is inflicted for the failure of the proscribed group to fulfill conditions laid down by the statute. *Cummings* v. *Missouri*, 4 Wall. (U.S.) 277; *Ex parte Garland*, 4 Wall. (U.S.) 333; *Pierce* v. *Carskadon*, 16 Wall. (U.S.) 234; *McFarland* v. *American Sugar Refining Co.*, 241 U.S. 79; *United States* v. *Lovett*, 328 U.S. 303; *In re Shorter* (D.C. Ala. 1865) Fed. Cases No. 12,811; *Ex parte Law*, 35 Ga. 285, Fed. Cases No. 8,126; *Green* v. *Shumway*, 39 N.Y. 418, 36 How.

Pr. 5; *State* v. *Heighland*, 41 Mo. 388; *In re Campbell*, 64 Cal. App. 300, 221 P. 952. See, also, *Ogden* v. *Saunders*, 12 Wheat. (U.S.) 213; The Federalist, Number 44; Note 51 Yale L.J. 1358 "Special Legislation Discriminating Against Specified Individuals and Groups"; Wormuth, Francis D., "On Bills of Attainder" in The Western Political Quarterly, Vol. III, No. 1, March 1950, pp. 52-65.

The Ordinance here falls squarely within the constitutional inhibition and the aforesaid legal precedents. It is a retrospective measure. It deprives persons of rights previously enjoyed, and inflicts disabilities which constitute punishment as severe as loss of liberty. The punishment is inflicted without the semblance of a judicial trial. It presumes persons to be guilty of offenses, either by membership in specified organizations or by membership in organizations which advocate proscribed doctrines; it deprives them of their vocations unless the presumption of guilt be first removed by their expurgatory oath—in other words, the Ordinance assumes the guilt and adjudges the punishment conditionally.

If the Ordinance had in terms provided that the petitioners here are guilty of past membership in the Communist Party or the Communist Political Association or in organizations which advocate the forcible overthrow of government, and deprived them of their office on that account, it is clear that such a measure would contravene the constitutional prohibition against bills of attainder. The Ordinance is not any less obnoxious because it attempts to force the same result through the form of a loyalty oath procedure. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure . . . It is the duty

of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*" *Boyd* v. *United States*, 116 U.S. 616, 635.

Prior to the enactment of this Ordinance, the burden rested upon the municipality to prove by due process that the civil service employees here were unfit to pursue their vocations because of prior membership in an organization which advocated forcible overthrow of government. It appears clear that the municipality was unable to assume such burden. Thereupon, the legislature shifted the burden upon the employees. The law presumes that there are persons who have belonged in the past five years to organizations which advocate the forcible overthrow of government; it compels persons to swear under oath that they have not been members of such organizations; refusal to take the prescribed oath operates as an admission of guilt and automatically results in dismissal. Thus, what the City of Los Angeles cannot do directly, it has done indirectly. The legislature has punished these petitioners by mere fiat, without any trial or proof of wrongdoing. Compare the critical analysis in *Cummings* v. *Missouri*, *supra*.

The same constitutional vice permeates that part of the Ordinance which requires an affidavit as to whether or not persons have ever been members of the Communist Party or Communist Political Association, as it does the oath of non-membership for the past five years in organizations which advocate the forcible overthrow of government.

In substance and effect, this Ordinance with its provisions for trial of "false swearing" and "disloyalty" (Section 9, R. 13), with its inquisitorial procedures and its provisions for compulsory incriminatory testimony (Section 14, R. 15) has for its manifest purpose the ouster from public employ, with stigma and disgrace, of all those who

are or were members of the Communist Party or the Communist Political Association. The Court below in its opinion (R. 40-46) clearly indicated that the State was not required to employ members of the Communist Party or the Communist Political Association. Moreover, the statement under oath that one was a member of the aforesaid proscribed organizations leads inevitably in the present milieu to ostracism, stigma, inquisition and possible criminal prosecutions, punishments as severe as actual loss of employment. Compare, *Alexander* v. *United States*, 181 F. 2d 480 (C.C.A. 9th, 1950); *United States* v. *Dennis*, 183 F. 2d 201 (C.C.A. 2d 1950); *American Communications Association* v. *Douds*, 339 U.S. 382. "And there comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49, 52.

What is involved here, both in the oath and affidavit provisions of the Ordinance, is a legislative proscription of certain ascertainable classes of persons from ever engaging in public employment in the City of Los Angeles because of their past membership in proscribed organizations. The Constitution forbids such a result.

American Communications Association v. *Douds*, *supra*, involved an oath concerning present membership in specified organizations. This Court observed that the statute was therefore decisively distinguishable from such statutes as were involved in *Cummings* v. *Missouri*, Ex parte Garland, etc. The individuals involved in the latter cases were in fact being punished for past actions; whereas in the Douds case they were subject to possible loss of position only because there was substantial ground for the congressional judgment that beliefs and loyalties would be transformed into future conduct. "* * *; there is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affi-

davit" (p. 413). Under the terms of the Ordinance here, no "voluntary alteration of loyalties" can possibly make the petitioners here eligible to take the oath or execute the affidavit.

The constitutional bulwark against bills of attainder was intended to secure fundamental rights of persons and property. "* * * laws of this character are oppressive, unjust and tyrannical; and, as such, are condemned by the universal sentence of civilized man." *Ogden* v. *Saunders*, *supra*, p. 266. There are, however, other profound reasons for the condemnation of bills of attainder.

A bill of attainder is a legislative act, which inflicts punishment without a judicial trial. *Cummings* v. *Missouri*, *supra*, p. 323. But one of the most essential attributes of the American constitutional system is the theory of separation of powers. The legislature is entrusted with the power to make general rules for the order of society; to other departments of government is entrusted the duty of applying these rules to particular individuals. "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of these rules to individuals in society would seem to be the duty of other departments." *Fletcher* v. *Peck*, 6 Cranch (U.S.) 87,136.

Unless this separation of powers is secure, there can be no assurance of impartiality in the treatment of individuals by government. If the power of the legislature is not restrained; if it may act as judge, jury and executioner, then the Constitution is not much more than waste paper, and the lives, liberties and properties of individuals in society may be lost without regard to "the law of the land." This Court has constantly condemned such usurpation of power. *Bailey* v. *Alabama*, 219 U.S. 219; *Manley* v. *Georgia*, 279 U.S. 1; *Western and Atl. R. R. Co.* v. *Henderson*, 279 U.S. 639; *Morrison* v. *California*, 291 U.S. 82;

McFarland v. *American Sugar Refining Co.*, 241 U.S. 79; *Tot* v. *United States*, 319 U.S. 463.

II. The Ordinance deprives petitioners of the liberties of freedom of thought, speech, assembly, association, the right to privacy of conscience and to petition for redress of grievances without due process of law in violation of the First and Fourteenth Amendments to the Constitution.

A. The Ordinance is a comprehensive measure intended as is stated at the outset of the law "to insure the loyalty of the officers and employees" of the City of Los Angeles (R. 11). It provides explicitly for a test oath of loyalty as a requirement for continuance in office.

In order to encourage citizens to enter into the employ of government, every effort has been made in the past decade to avoid the evils of the "spoils system", to free government employees from political influence, to leave them free to act as independent citizens wholly unhampered by the "hydraulic pressures" of the day. Fish, The Civil Service and the Patronage, 1905; Merriam, Public Personnel Problems, 1938; Mosher & Kingsley, Public Personnel Administration, 1941.

The Ordinance here points in another direction. It imposes political conditions upon employees in the classified civil service whose ability and integrity are not in question. Here a municipality has discharged persons with civil service tenure for refusing to take an oath concerning their past, present and future beliefs and associations, a requirement exacted long after such employees had entered into office and faithfully discharged their duties.

Whether the State has the constitutional power to exact such an oath is the question here. "The Constitution may well elicit expressions of loyalty to it and to the government which it created, but it does not command such ex-

pressions or otherwise give any indication that compulsory expressions of loyalty play any such part in our scheme of government as to override the constitutional protection of freedom of speech and religion" dissenting opinion of Chief Justice Stone in *Minersville School District* v. *Gobitis,* 310 U.S. 586, 605; Compare, *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624.

There are limits, as this Court indicated in *United Public Workers* v. *Mitchell,* 330 U.S. 75, 100, upon the power of a State to condition employment in government. See also, *Cummings* v. *Missouri,* 4 Wall. (U.S.) 277, 320-321. Especially are those limits reached when state action intrudes into liberties protected by the First Amendment. "Where the First Amendment applies, it is a denial of all governmental power in our federal system." *Marsh* v. *Alabama,* 326 U. S. 501, 511. There is no power in the state to discriminate between its employees upon grounds that are made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations which, as is conceded in the case herein, have no bearing upon the fitness of the employees to continue in their employment. The State, even as an employer, is still subject to the requirements of the Constitution.

The court below was of the opinion that it was the duty of those charged with the management of the business of government to "insure unconditional, unswerving loyalty of every servant of the people, high or low" (R. 45). The Court did not however meet the crucial issue involved here. The question is whether the means adopted to secure such result were legitimate within the purview of the Constitution. The City of Los Angeles has prescribed standards of "education, experience, knowledge and ability" for incumbents in office. Charter, City of Los Angeles, Section 100. In the application of statutes which on their face pre-

scribe general rules of competence and conduct for employees, it is possible for the State in particular cases to weed out the traitor and the fakir. In such situations, the employee whose livelihood is at stake has the safeguards which due process of law afford him, and the State is protected if once it establishes that the employee has by his activities been guilty of misconduct or incompetence. All that can be claimed under such circumstances is the unconstitutional application in a specific case of a valid statute.

The Ordinance here on its face adopts entirely different methods "to insure the loyalty of its officers and employees." The statute compels an oath of loyalty. It is not an ordinary oath of allegiance to the Constitution. It is an expurgatory oath which is compelled. Unlike the statute in *United Public Workers* v. *Mitchell, supra*, which allegedly sought to preserve the integrity of the citizen's exercise of the franchise by withdrawing government and its employees from some aspects of the electoral process, the Ordinance here actively intervenes to interdict certain ideas and associations, and commands the employees to do the same. The Ordinance is not concerned with standards of conduct or competence; it is concerned solely with coercing opinion and association. The Ordinance does not deprive the criminal or the incompetent of his employment: it deprives those who cannot or will not take an oath which forswears past, present and future beliefs and associations. The Ordinance intrudes into an area completely withdrawn from governmental cognizance by the Bill of Rights. "To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 636.

B. Under our constitutional system, the coercion of loyalty is unknown. "The idea that loyalty will ultimately be given to a government only so long as it deserves loyalty and that opposition to its abuses is not treason has made our government tolerant of opposition based on differences of opinion that in some parts of the world have kept the hangman busy." *Cramer* v. *United States*, 325 U.S. 1, 21. The American tradition is eternal hostility against every form of tyranny over the mind of man.

The history of centuries attests to the basic truth that the coercion of loyalty is a mistake—a socially harmful mistake. The social concepts of freedom of thought and freedom of speech arose out of ancient struggles against Authority. The loyalty which the Athenians demanded, Socrates refused. Bury, J. B., A History of Freedom of Thought, Lond. 1913, pp. 31-35. A sketch of the history of the struggle against the coercion of opinion would include Milton's conflict with the Censor (Areopagitica, Works IV), the rise and fall of Star Chamber, the refusal of Sir Thomas More to renounce the head of the Catholic Church (Encyc. of Social Sciences, XI, p. 8), the seditious libel prosecutions against Wilkes and Junius, the defense of Stockdale by Thomas Erskine, the religious persecutions which plagued England and Europe for centuries, the persecutions of heretics, the test oaths and ex-officio oaths, the persecutions in 18th century England of the London Corresponding Society, Orange Societies and Anti-Corn Law societies (May, Constitutional History of England, 1889, II, Chs. IX-XIV)—in sum, the wide sweep of important historical events from the advent of civilization which in almost every instance bore in some way on the struggle against coerced loyalty.

In the realm of reason (*West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624), as well as the realm

of conduct (*Chambers v. Florida*, 309 U.S. 227), the forced extraction of men's beliefs or acts are incompatible with a free society. Under our constitutional system, the word "loyalty" defies definition. It has no fixed content. Men experience deep intellectual and emotional shifts in their loyalties many times in their lives. The greatest loyalty sometimes requires hostility to governmental policies and institutions. Those who equate loyalty with conformity misconceive the American tradition. Henry Steele Commager, Who is Loyal to America? in Harper's Magazine, September, 1947; Curti, Merle, The Roots of American Loyalty, N. Y., 1946 "* * * the citizen who thinks he sees the commonwealth's political clothes are worn out, and yet holds his peace, and does not agitate for a new suit, is disloyal, he is a traitor." Mark Twain in the Connecticut Yankee.

It is not only that loyalty laws are inherently contrary to the fundamental law; their illegality lies in the possible abuses and oppression which may flow from their existence. Under such measures, persons in order to exercise their vocations are in effect compelled to hold opinions as to governmental matters deemed by a State officer consistent with loyalty. See, Smith, Alfred E., Public Papers, N. Y., 1923, p. 292; Lehman, H. H., Public Papers, N. Y. 1938, p. 120. "What matters is the existence of the weapon. Once the sword is placed in the hands of the people in power, then, whatever it says, they will be able to reach and slash at almost any unpopular person who is speaking or writing anything that they consider objectionable criticism of their policies." Chafee, Z., Freedom of Speech, 1941, p. 466.

C. Not only does the Ordinance on its face and as applied to the petitioners here abridge constitutional guarantees

of freedom, but by its terms the Ordinance deprives petitioners of their liberties without due process of law.

The provisions of the Ordinance are sufficiently broad to permit the most arbitrary and discriminatory application of its provisions. Section 9 of the Ordinance (R. 13) provides that whenever an appointing authority "is in doubt" as to whether or not an officer or employee swore falsely in or violated an oath required under the Ordinance, the official must "investigate and determine the facts." This Section provides no standards and requires no notice or hearing. All that is required is a "doubt" concerning the veracity or ideological loyalty of the employee. In such event, the appointing authority becomes accuser and judge, whose suspicions need be the only evidence whose determination becomes the sentence.[6]

To have a "doubt" concerning the loyalty of an employee or the validity of his opinions and associations, and to be empowered to investigate and resolve that "doubt", means only that an administrative official may interpret or license or censor opinion and belief, and compel loyalty in accordance with the official's own predilections. Moreover, since this Ordinance deals with past loyalty, with past associations and ideas, it provides the official with an arbitrary and oppressive mechanism for inquisition and thought surveillance.

Under this Ordinance a supervisory official may decide that an employee is disloyal and a perjurer without notice, evidence or hearing. The Ordinance permits, therefore, not only the exercise of a prior restraint upon opinions and associations, but it countenances the imposition of sanc-

[6] The Ordinance sets up an alternative procedure for investigation (Sections 10-23). The procedure may be invoked, however, only by the officials of any department who are unwilling to conduct their own investigation (Section 11). The employee is not authorized to request the alternative procedure.

tions for the exercise of constitutionally protected rights. The Ordinance permits the condemnation of persons for ideas and doctrines to which they do not personally subscribe. Compare, *Schneiderman* v. *United States*, 320 U.S. 118; *Bridges* v. *Wixon*, 326 U.S. 135. It encourages heresy-hunting. Compare, *United States* v. *Ballard*, 322 U.S. 78. "The existence of such a statute which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion which might reasonably be regarded as within its purview." *Thornhill* v. *Alabama*, 310 U.S. 88, 98.

This Court has never held that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution. *Yamayata* v. *Fisher*, 189 U.S. 86, 100. A measure such as the Ordinance here which vests arbitrary and unrestricted power in an administrative official to coerce the loyalty of employees is unconstitutional on its face. "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas." *Thornhill* v. *Alabama, supra*, p. 97. The power vested in officials under this Ordinance is so vague and ambiguous as to enable the law to be made the instrument of capricious suppression of free speech and assembly. Such measures have never outlived the scrutiny of this Court. *Lovell* v. *Griffin*, 303 U.S. 444; *Hague* v. *C.I.O.*, 307 U.S. 496; *Schneider* v. *Irvington*, 308 U.S. 147; *Carlson* v. *California*, 310 U.S. 106.

Conclusion

Wherefore, the petition for writ of certiorari to the District Court of Appeal of the State of California, Second Appellate District, should be granted.

Respectfully submitted,

JOHN T. MCTERNAN
Counsel for Petitioners Garner, et al.

CHARLES J. KATZ
Of Counsel.

APPENDIX

Ordinance Number 94,004

An Ordinance to effectuate the provisions of Charter Section 432 and otherwise to insure the loyalty of the officers and employees of this City.

The People of the City of Los Angeles Do Ordain As Follows:

Section 1. Every person who is hereafter elected or appointed to an office or position in the service of the City of Los Angeles must, before entering upon the duties of his office or position, take and subscribe to the following oath:

I, ... , do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America and the State of California, and will support and defend the Constitution and laws of the United States of America and of the State of California and the laws of the City of Los Angeles against all enemies, foreign and domestic. I further swear (or affirm) that I do not advise, advocate or teach, and have not within the period beginning five (5) years prior to the effective date of the ordinance requiring the making of this oath or affirmation, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California, and that I am not now and have not, within said period, been or become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of California. I further swear (or affirm) that I will not, while I am in the service of the City of Los Angeles, advise, advocate or teach, or be, or become a member of or affiliated with any group, association, society, organization or party which advises, advocates or teaches, or has within said period, advised, advocated or taught, the

overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California, that I will well and faithfully discharge the duties of my office or employment in the service of the City of Los Angeles and that I take this whole obligation freely without any mental reservation or purpose of evasion, So Help Me God.

Sec. 2. Every person who now holds or occupies an office or position in the service of the City of Los Angeles must, within thirty (30) days after the effective date of this ordinance, or if he be on leave or under suspension for cause from the service of the city at such effective date, within thirty (30) days after his return to such service, take and subscribe to the oath set forth in Section 1 hereof.

Sec. 3. Every person who is hereafter elected or appointed to an office or position in the service of the City of Los Angeles must, before entering upon the duties of his office or position, execute an affidavit stating whether or not he is or ever was a member of the Communist Party of the United States of America or of the Communist Political Association, and if he is or was such a member, stating the dates when he became, and the periods during which he was, such a member; provided, however, that no additional affidavit shall be required on account of the transfer, demotion or promotion of any person who has once executed an affidavit under this section or under Section 4 hereof.

Sec. 4. Every person who now holds or occupies an office or position in the service of the City of Los Angeles must, within thirty (30) days after the effective date of this ordinance, or if he be on leave or under suspension for cause from the service of the city at such effective date, within thirty (30) days after his return to such service, execute an affidavit stating the facts required to be stated in the affidavit required by Section 3 of this ordinance.

Sec. 5. Each oath and affidavit required hereunder shall be taken, executed and signed before an officer authorized by law to administer oaths, and the jurat of such officer shall be affixed to the document so subscribed under the official seal of such officer. No officer or employee of the

city shall require or receive the payment of any fee for administering any oath or affirmation provided for herein.

Sec. 6. The form of the affidavit required by Sections 3 and 4 hereof shall be prepared by the City Clerk. The City Clerk shall secure and maintain a supply of printed forms of the said affidavit and of the oath required by Sections 1 and 2 hereof, and shall furnish such forms as may be necessary to officers and employees of the city, to the Board of Civil Service Commissioners and to the heads of the departments of the city.

Sec. 7. The oaths and affidavits required hereby to be executed by officers and employees of the city who are appointed or employed under the provisions of Article IX of the City Charter shall be filed with the Board of Civil Service Commissioners and shall be a part of the officer's or employee's personnel record on file with the said board. All other oaths and affidavits required hereunder shall be filed with the City Clerk.

Sec. 8. It shall be the duty of each appointing power to require each officer or employee to execute and file an oath and affidavit as required hereby.

Sec. 9. Whenever an appointing authority is in doubt as to whether or not an officer or employee subject to his direction swore falsely in or has violated an oath required hereunder, he must investigate and determine the facts or, if he is the general manager of a department, he must either investigate and determine the facts or report the case to the board of commissioners of his department, and in the latter event the said Board of commissioners must then investigate and determine the facts.

Sec. 10. (a) There shall be a committee of three (3) examiners, hereinafter called the "Committee," to investigate the cases hereafter described. One examiner shall be designated by the Board of Social Service Commissioners from among its members, one shall be designated by the Board of Police Commissioners from among its members, and the other shall be designated by the City Attorney from among his assistants or deputies. Such designations shall be made promptly after the effective date of this ordinance,

and certificates thereof shall be filed with the Secretary of the Committee.

(b) The Secretary of the Board of Social Service Commissioners shall be and act as the Secretary of the Committee.

(c) As soon as the examiners are designated they shall meet and elect one of their number as chairman.

(d) The Board of Civil Service Commissioners shall, at the demand of the chairman of the Committee, furnish such stenographic assistance and supplies as may be needed.

(e) Either the Board of Social Service Commissioners or the Board of Police Commissioners may at any time designate another member to succeed the member of such board of commissioners then serving as an examiner, and the City Attorney may at any time designate another of his assistants or deputies to succeed the assistant or deputy City Attorney then serving as an examiner. After the designation of his successor, an examiner shall continue to serve as such until the completion of all pending matters, but the examiner designated as his successor shall upon his designation become an existing qualified examiner for all purposes connected with new matters.

(f) A majority of the examiners then serving may at any time elect another examiner to be chairman instead of the chairman then serving.

Sec. 11. A board of commissioners which is required hereby to conduct an investigation may do so by appointing the members of the Committee as examiners, under Section 89 of the Charter, to conduct the investigation and to submit their report thereon. Such board of commissioners is hereinafter called the "Commission" and the officer or employee to be investigated is hereinafter called the "Respondent." In each such case the provisions hereinafter contained in Sections 12 through 23, inclusive, shall be applicable.

Sec. 12. Such Commission shall transmit to the Secretary of the Committee a copy of its resolution determining that such investigation shall be made and appointing the members of the Committee as examiners to conduct such investi-

gation. The Commission shall embody in such resolution, or transmit with such copy, a statement of the grounds for such investigation. The Secretary of the Committee shall then fix a time and place for beginning the inquiry, and shall give at least fifteen (15) days notice thereof to the examiners, the Respondent and the Commission. The notice to the Respondent shall include a statement of the grounds for the inquiry.

Sec. 13. The Committee shall meet at the time and place fixed and shall then proceed to inquire into the matter. The Respondent shall be present at such meeting and at subsequent meetings of the Committee as directed by the management of his department.

Sec. 14. The Committee shall conduct a full investigation into the questions of whether or not the Respondent swore falsely in or violated any oath executed by him under this ordinance. A member of the Respondent's department designated by its appointing authority shall be present at each session of the investigation and shall present the facts constituting the grounds therefor.

Sec. 15. Any examiner shall have the power to administer oaths and affirmations to witnesses before the Committee. The chairman shall preside at all meetings of the Committee, direct the order of its business, and rule upon the admission of evidence. He may continue a meeting at any stage thereof, and may call a meeting at any time. He shall require the maintenance of order in the meeting room, may expel any disorderly person from the meeting room and may call upon the aid of the Chief of Police for such purposes. Any decision of the chairman shall be overruled at the demand of the other two (2) examiners.

Sec. 16. Upon the demand of an examiner the City Clerk shall issue a subpoena requiring the attendance as a witness of the person sought to be subpoenaed, at a time and place specified. Upon demand of such examiner, accompanied by an affidavit specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the questions involved in the investigation, and stating that the witness has the desired

matters or things in his possession or under his control, such subpoena shall require the production of physical evidence. All such subpoenas shall be issued in the name of the city, and shall be attested with the city seal. The Chief of Police shall cause all such subpoenas to be served by some member of the Police Department.

Sec. 17. The Respondent shall have the right to be present at all meetings of the Committee at which any evidence is received. He shall have the right to be confronted by all the witnesses who testify in the matter and to see or examine all written or physical evidence. He shall have the right to be represented by counsel, to cross examine witnesses other than the witnesses who are called by him, to obtain the issuance of subpoenas for the attendance of witnesses and the production of evidence, and to produce evidence bearing upon the questions under consideration. The Respondent may testify as a witness, and it shall be his duty to testify as a witness at the direction of the appointing authority of his department. All testimony heard by the Committee shall be given under oath or affirmation. Before any evidence is received the chairman shall advise the Respondent of the Respondent's rights, privileges and duties hereunder and of his rights, privileges and immunities under the Constitution of the United States and under the Constitution of the State of California with respect to the Respondent giving testimony which might tend to incriminate or degrade him.

Sec. 18. Each examiner shall be present at all times during every meeting of such Committee; each must hear, examine or view all evidence considered, and must read all documents filed with or received by, such Committee, and each must read all reports proposed to be submitted by any examiner.

Sec. 19. At the direction of the chairman any of the proceedings before the Committee may be reported by a stenographic reporter in the employ of the city, and the report so made shall be transcribed at the direction of the chairman, or the commission. No copy of the transcript shall be delivered to anyone except by direction of the

chairman, and upon the payment of the cost thereof to the City Treasurer, in an amount determined by the schedule of transcript fees now provided in the Code of Civil Procedure of this state; Provided, however, that if upon charges that he swore falsely in or violated an oath executed by him under this ordinance the Respondent is subsequently discharged from his position and requests a hearing before the Board of Civil Service Commissioners, or if such charges against the Respondent are filed with the Board of Fire Commissioners under Section 135 of the charter or with the Board of Police Commissioners under Section 202 of the charter, a true copy of the transcript shall be delivered to the Respondent upon his payment of the cost thereof.

Sec. 20. The meetings of the Committee shall not be public hearings. The Chairman may exclude from the meeting room any person other than the examiners, the Respondent and his counsel and such other persons as may be present at the request of the Respondent; provided, however that if any reporter or any agent of any periodical publication is present at the request of the Respondent, at least one reporter or agent of each other periodical publication shall be allowed to be present. Neither the reports of proceedings before it nor the evidence received and filed by it nor the reports made by such Committee shall be public documents, and no person other than the examiners shall have a right to see or examine such papers or documents, except as provided by Sections 17, 19, and 21 hereof; provided, however, that such papers and documents shall be produced at the direction of the Board of Civil Service Commissioners in any hearing before it.

Sec. 21. When the Committee has considered all of the evidence received by it, it shall conclude its inquiry and shall prepare a written report upon the questions which it has considered. Any examiner who cannot agree with such a report shall prepare a separate report. Each report prepared shall contain a summary of the evidence considered, with findings of fact thereon, and conclusions and recommendations with a statement of the reasons there-

for. A report agreed to by all of the examiners shall be signed by all of them; a report agreed to by two examiners shall be signed by both of them, and individual reports shall be signed by the examiners preparing them. All such reports, together with any transcript of the proceedings and all papers and things filed with or received by the Committee, shall thereupon be transmitted to the Commission.

Sec. 22. Upon its receipt and consideration of the report or reports from the Committee the Commission may adopt, reject or modify any such report in whole or in part, or may reconsider the matter in whole or in part, and shall thereafter take such action, or instruct its general manager to take such action respecting the retention or discharge of the Respondent, as appears to such Commission to be proper or to be required by law.

Sec. 23. Any person who fails or refuses without lawful excuse to attend at any meeting of the Committee, or to produce material evidence in his possession or under his control, as required by any subpoena served upon such person as provided for herein, or who, being present before such Committee willfully refuse to be sworn or to answer any material and proper question when directed by the chairman of such Committee, shall be guilty of a misdemeanor and shall be punishable by a fine of not more than $500.00 or by imprisonment in the city jail for not more than six (6) months, or by both such fine and imprisonment.

Sec. 24. If any provision, section, paragraph, sentence, clause, phrase or word of this ordinance is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of any other part of this ordinance, and the Council hereby declares that it would have adopted each provision, section, paragraph, sentence, clause, phrase and word herein contained without regard to the adoption at the same time of other parts hereof.

Sec. 25. The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was introduced at the meeting of the Council of the City of Los

Angeles of September 8, 1948, and was passed at its meeting of October 21, 1948.

WALTER C. PETERSON,
City Clerk.

By A. McCOY,
Deputy.

Approved this 29th day of October, 1948.

FLETCHER BOWRON,
Mayor.

C. F. 27647, Supp. #1 and #2 (20598) 11/5 1t.

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IN THE

Supreme Court of the United States

October Term, 1950.

No. 453.

RAY H. GARNER, HARRY BECKERMAN, AIDA BELDNER, JOHN B. BROWN, CARRIE L. DICK, MARY E. GRUNEWALD, EUGENE HALLETT, MARGARET B. HASKELL, EDWARD HAVENS, CORNELIUS LAWRENCE, VERA MANN, OLA ROSS PACIFICO, DANA PLATT, EUGENE REED, FRANCES SCHWARTZ, WILLARD SMART, FRANK TORREANO,

Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; CLARENCE J. DERRICK, JOSEPH O. DONOVAN, LOUIS M. DREVES, FRANK GILLELEN, EDWARD L. TAYLOR and MILTON OFFNER, as Members of the Board of Public Works of the City of Los Angeles; BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; SAMSON A. LINDAUER, JUSTIN W. GILLETTE, CHARLES E. ARNN, RANSOM M. CALLICOTT, and MRS. IDA S. LAZARD, as Members of the Board of Civil Service Commissioners of the City of Los Angeles; DAN O. HOYE, City Controller of the City of Los Angeles THE CITY OF LOS ANGELES, a Municipal Corporation,

Respondents.

PETITIONERS' REPLY BRIEF.

JOHN T. MCTERNAN,
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TABLE OF AUTHORITIES CITED

CASES

	PAGE
American Communications Association v. Douds, 339 U. S. 382	4
Cummings v. Missouri, 71 U. S. 277	5, 6
Garland, Ex parte, 71 U. S. 333	5, 6, 7
Gorvin v. Chambers, 195 Cal. 212	8
Parker & Steiner v. County of Los Angeles, 337 U. S. 929, 338 U. S. 327	2, 7, 8
United States v. Lovett, 328 U. S. 303	5, 6

STATUTES

California Constitution, Art. XX, Sec. 3	3
Los Angeles City Charter, Sec. 13	3
Los Angeles City Charter, Sec. 112(a)	7
Los Angeles City Charter, Sec. 432	7
Los Angeles City Ordinance No. 94,004	3

IN THE

Supreme Court of the United States

October Term, 1950.
No. 453.

RAY H. GARNER, HARRY BECKERMAN, AIDA BELDNER, JOHN B. BROWN, CARRIE L. DICK, MARY E. GRUNEWALD, EUGENE HALLETT, MARGARET B. HASKELL, EDWARD HAVENS, CORNELIUS LAWRENCE, VERA MANN, OLA ROSS PACIFICO, DANA PLATT, EUGENE REED, FRANCES SCHWARTZ, WILLARD SMART, FRANK TORREANO,

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vs.

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Respondents.

PETITIONERS' REPLY BRIEF.

The importance of the questions raised in the petition for writ of certiorari are accentuated by respondents' arguments in opposition. The gravity of the issues presented in the petition is emphasized not only by respondents' affirmative statements; it is increased by the respondents' failure to comment upon the real constitutional questions

involved on this proceeding. The logic of the respondents' position is that there are no limits upon the power of a state to impose test oaths upon public employees or, indeed, upon any segment of the population whose activities are in some way regulated or controlled by state machinery. Under such circumstances, it is respectfully submitted, federal questions of the most far-reaching and profound importance are herein presented.

I.

The respondents' brief in opposition makes no reference to this Court's decisions in *Parker v. County of Los Angeles; Steiner v. County of Los Angeles,* 337 U. S. 929; 338 U. S. 327. We have, therefore, the implicit admission that the issues raised in those cases are the same as those involved herein. Those issues this Court characterized as "serious" and it was because of the seriousness of the constitutional questions which rose from the enactment of the so-called loyalty law that this Court granted certiorari. The importance of the constitutional questions has not diminished since December 5, 1949, when the *Parker* and *Steiner* cases were decided. On the contrary, this Court may judicially notice the rising tide of "loyalty laws" and "test oaths" which have either been enacted or proposed by state and local subdivision of government affecting millions of citizens and which have been the subject of heated controversy in the public forums. There is widespread doubt that these measures are compatible with guaranteed constitutional rights. The issue should be resolved by this Court.

The respondents' statement of "issues presented on certiorari" (Br. p. 6) furnishes ample reason for the grant of certiorari herein. The respondents' pose the inquiry as to whether, "assuming a federal question is presented," a municipality may dismiss an employee because he refused "to take an oath of allegiance"; refused "to assert his past loyalty for a five-year period"; refused "to state whether or not he had been a member of certain named organizations." To pose the questions in this manner, glossing over their serious constitutional implications, is sufficient to call upon this Court for a definitive reply.

For it is not merely an "oath of allegiance" which is involved herein. The Charter of the City of Los Angeles (Sec. 13) and the Constitution of the State of California (Art. XX, Sec. 3) require an oath of support for the Constitutions of the state and federal government. That oath is not involved herein. The content of the oath set forth in Ordinance No. 94,004 reaches far beyond the confines of support for the fundamental law, and trenches into areas normally protected from governmental intrusion under the Bill of Rights. Nor have the respondents furnished any support for their assertion that a state may dismiss an employee in its civil service for refusing to assert his "past loyalty"—whether it be for a period of five or twenty years, or, so far as the respondents seem to believe, a life time. The question whether loyalty may be so coerced, and whether such a pervasive restraint may be imposed upon employees of the state, is one which this Court cannot fail to answer, it is respectfully submitted, consistent with its constitutional commission. Further, to dismiss an employee because he refused to swear whether or not he is a member of "certain named organizations" raises important questions concerning the

fundamental right of assembly and association to which the respondents in their brief have made no reply.[1]

The issues involved herein affect the power of the state to reach and lay burdens upon liberties of thought, speech, association and petition; to compel disclosures under oath which involve the exercise of First Amendment liberties as governmental functions of the people in a self-governing society; to coerce and censor the free choice of opinions and associations; to compel and coerce "loyalty"; to audit and weigh the "past loyalty" of its employees. These are issues which the respondents in their brief have avoided. They should not remain unresolved.

II.

To the argument that the Ordinance here constitutes a bill of attainder, the respondents reply that "the people of a City may require that their servants have been loyal to the constitutional government of the United States and the state during the five-year past period" (Br. p. 18). It is submitted that such an answer fails to even touch upon the essential aspects of the serious question raised herein.

If advocacy of certain proscribed doctrines or membership in certain named organizations are conceived by the state to be vulnerable to punishment, penalty or disability,

---

[1]There are two organizations named in the Ordinance, the Communist Party of the United States of America and the Communist Political Association. With respect to that section of the oath concerning advocacy of the forcible overthrow of government by violence "or other unlawful means" there has been no narrow construction of the language limited to the presently existing government as in *American Communications Association v. Douds*, 339 U. S. 382, 406. We do not concede the validity of the Ordinance even if its language were in this single respect so narrowly construed.

great or small, total or conditional, immediate or suspended, the imposition thereof may be had under our law only through action by some agency exercising judicial powers and observing the rules and safeguards of fair hearing and trial. The Legislature is utterly without right to adjudicate individual causes, civil or criminal, or to impose upon named or identifiable individuals or groups punishment, penalty or disability of any kind. This is the entire meaning of the constitutional provisions and principles relating to bill of attainder, special legislation and the separation of the legislative from the judicial powers of government. (*United States v. Lovett*, 328 U. S. 303, 317.)

The legislative test oath contained in the Ordinance herein is almost identical in its form to the oaths stricken down in the historic bill of attainder cases of *Cummings v. Missouri*, 71 U. S. 277, and *Ex parte Garland*, 71 U. S. 333. In the *Cummings* case the State of Missouri required all public officers and all preachers, teachers, lawyers and executive officers of corporations as a condition of continued office to take an oath after the termination of the Civil War that they had never engaged in any conduct hostile to the United States or expressed any disloyal sentiments or advised, aided or abetted any enemies of the United States. The *Garland* case involved a kindred oath applied by the federal government to members of the bar of the United States courts. The consequences of inability to take the oath was disqualification, precisely the same as the consequence here.

This Court pointed out in the *Cummings* and *Garland* cases the essential vice of such test oaths. This Court stated:

> "In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense . . . And this is not all. The clauses in question subvert the presumptions of innocence and alter the rules of evidence which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the party."
>
> 71 U. S. 277, 323, 327.

The respondents attempt on the one hand to avoid the infirmity of the Ordinance by designating it as a requirement "of qualification merely" (Br. p. 21); on the other hand, they make abundantly clear (Br. pp. 20-21) that in fact the Ordinance is intended to punish for past belief and association. In *United States v. Lovett*, 328 U. S. 303 the rule of the *Cummings* and *Garland* cases were explicitly applied to a legislative act discharging three federal employees from further federal service for alleged "disloyalty." "This permanent proscription from any op-

portunity to serve the Government is punishment, and of a most severe type" (*supra*, p. 316). Respondents' reference to Section 432 of the Charter of the City of Los Angeles accentuates the significance of the question raised here. As this Court stated in the *Garland* case: "The exaction of the oath is the mode provided for ascertaining the persons upon whom the act is intended to operate, and instead of lessening, increases its objectionable character." (71 U. S. 333, 337.)

III.

In the light of this Court's grant of certiorari in the *Parker* and *Steiner* cases, there can be no doubt, it is respectfully submitted, that appropriate federal questions have been presented which should be finally decided by this Court. Under the provisions of the Charter of the City of Los Angeles (Sec. 112(a)), no person in the classified civil service can be discharged except for cause. The petitioners were discharged solely upon the ground that they had failed to comply with the terms of the Ordinance [R. 4-5]. The Civil Service Commission sustained their dismissal upon that ground alone [R. 25-26]. It is admitted by the respondent that but for the asserted failure to comply with the provisions of the Ordinance, petitioners each performed the services required of him in a competent and satisfactory manner, and were at all times fit and suitable persons to fill the positions from which they were removed [R. 6]. The respondents relied solely and entirely upon the Ordinance, to justify the discharge of petitioners. The constitutionality of

the Ordinance was attacked in detail in the trial court [R. 7-9]; on appeal [R. 40-46]; on rehearing [R. 38]; and on petition for hearing to the Supreme Court of California [R. 35-40]. These matters were open for judicial determination (*Gorvin v. Chambers,* 195 Cal. 212) and presented federal questions cognizable by this Court and necessary for determination. (*Fowler & Steiner v. County of Los Angeles,* 337 U. S. 92. 338 U. S. 327.)

Conclusion.

Wherefore, the petition for writ of certiorari to the District Court of Appeal of the State of California, Second Appellate District, should be granted.

Respectfully submitted,

JOHN T. MCTERNAN,
Counsel for Petitioners Garner, et al.

CHARLES J. KATZ,
Of Counsel.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of February, A. D. 1951.

2-20-51—60

SUBJECT INDEX

PAGE

Opinion below 2

Jurisdiction 2

State action involved 2

Statement of the case 3

Questions presented 5

Summary of argument 6

Argument 9

I.

The ordinance enacted by the Council of the City of Los Angeles is unconstitutional as a bill of attainder and ex post facto law 9

A. Background of the provisions against bills of attainder and ex post facto laws 10

B. The decisions of this court in Cummings v. Missouri and Ex parte Garland 25

C. The ordinance enacted by the City Council of the City of Los Angeles 31

D. Conclusion—The decisions of this court in Dent, Hawker and Lovett 40

II.

The City of Los Angeles was without constitutional power to require the test oath and affidavit set forth in the ordinance and petitioners' discharge for failure to execute the said oath and affidavit deprived petitioners of freedom of speech, press, assembly, association and the right to petition for redress of grievances without due process of law in violation of the Fourteenth Amendment to the United States Constitution 44

PAGE

A. Introduction 44

B. The decisions of this court in the Gobitis and Barnette cases 49

C. Compulsory loyalty oaths have no place in the American constitutional system 56

D. In the light of the liberties guaranteed by the Fourteenth Amendment, the compulsory loyalty oath is an inappropriate means to attain the loyalty of citizens in the public employ 63

Conclusion 68

TABLE OF AUTHORITIES CITED

CASES	PAGE
American Communications Association v. Douds, 339 U. S. 382	30, 54, 57
American Federation of Labor v. Swing, 312 U. S. 321	47
Bailey v. Alabama, 219 U. S. 219	26, 36
Bell, In re, 19 Cal. 2d 488	40
Board of Education v. Haddon Farms, 128 N. J. L. 306, 25 A. 2d 905	47
Boyd v. United States, 116 U. S. 616	26
Brown v. Maryland, 12 Wheat. (U. S.) 419	26
Cantwell v. Connecticut, 310 U. S. 296	47
Chambers v. Florida, 309 U. S. 227	47, 54
Chaplinsky v. New Hampshire, 315 U. S. 568	47
Collins v. New Hampshire, 171 U. S. 30	26
Communist Party v. Peek, 20 Cal. 2d 536, 127 P. 2d 889	36
Cummings v. Missouri, 4 Wall. (U. S.) 277	6, 7, 25, 27, 30, 31, 34, 40, 41
De Jonge v. Oregon, 299 U. S. 353	59, 65
Dent v. West Virginia, 129 U. S. 114	40, 42
Fairbanks v. United States, 181 U. S. 283	26
Fletcher v. Peck, 6 Cranch (U. S.) 87	9
Garland, Ex parte, 4 Wall. (U. S.) 333	6, 7, 25, 27, 29, 30, 31, 34, 40, 41
Green v. Shumway, 39 N. Y. 418, 36 How. Pr. 5	31
Grosjean v. American Press Co., 297 U. S. 233	26
Hawker v. New York, 170 U. S. 189	42
Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203	59
Law, Ex parte, 35 Ga. 285, Fed. Case No. 8,126	31
Macallen Co. v. Massachusetts, 279 U. S. 620	26
Manley v. Georgia, 279 U. S. 1	36

PAGE

Marsh v. Alabama, 326 U. S. 501 48
McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N. E. 517 47
McFarland v. American Sugar Refining Co., 241 U. S. 79 ..... 36, 37
Meyer v. Nebraska, 262 U. S. 390 47
Minnersville School District v. Gobitis, 310 U. S. 586 49
Missouri ex rel. Gaines v. Canada, 305 U. S. 337 47
Mooney v. Holohan, 294 U. S. 103 47
Moore v. Dempsey, 261 U. S. 86 47
Murphy and Glover Test Oath Cases, 41 Mo. 340 31
Musser v. Utah, 333 U. S. 95 48
National Mutual Ins. Co. v. Tidewater T. Co., 337 U. S. 582 24
Near v. Minnesota, 283 U. S. 697 26
Ogden v. Saunders, 12 Wheat. (U. S.) 213 9
Oliver, In re, 333 U. S. 257 54
Palko v. Connecticut, 302 U. S. 319 62
Pennekamp v. Florida, 328 U. S. 331 47
People v. Ziady, 8 Cal. 2d 149, 64 P. 2d 425 37
Pierce v. Society of Sisters, 268 U. S. 510 47
Powell v. Alabama, 287 U. S. 45 47
Reynolds v. United States, 98 U. S. 145 47
Shelley v. Kramer, 334 U. S. 1 47
Shorter, In re (D. C. Ala., 1865), Fed. Cas. No. 12,811 31
Spayd v. Ringling Rock Lodge, 270 Pa. 67, 113 Atl. 70 47
State v. Heighland, 41 Mo. 388 31
Steele v. Louisville & Nashville R. R. Co., 323 U. S. 102 47
Stromberg v. California, 283 U. S. 359 ..... 40, 62, 65
Thomas v. Collins, 323 U. S. 516 ..... 26, 63
Thornhill v. Alabama, 310 U. S. 88 ..... 47, 66
Tolman, et al. v. Underhill, et al., April 6, 1951, Civ. No. 7946 .. 63
Tot v. United States, 319 U. S. 463 36

PAGE

United Public Workers v. Mitchell, 330 U. S. 75 47
United States v. Carolene Products Co., 304 U. S. 144 62
United States v. Constantine, 296 U. S. 287 26
United States v. Lovett, 328 U. S. 303 ..... 25, 30, 43
United States ex rel. Milwaukee v. Burleson, 255 U. S. 407 ..... 47, 54
Virginia, Ex parte, 100 U. S. 339 47
Watts v. Indiana, 338 U. S. 49 54
West Virginia State Board of Education v. Barnette, 319 U. S. 624 ..... 7, 50, 55, 60, 63
Western and Atlantic R. R. Co. v. Henderson, 279 U. S. 639 36
Williams v. North Carolina, 317 U. S. 287 40
Yick Wo v. Hopkins, 118 U. S. 356 47
Yu Cong Eng v. Trinidad, 271 U. S. 500 40

MISCELLANEOUS

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PAGE

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PAGE

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Statutes

California Constitution, Art. XX 63

California Penal Code, Sec. 118 37

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Los Angeles City Charter, Sec. 13 63

Los Angeles City Charter, Sec. 100 48

Los Angeles City Charter, Sec. 103 48

Los Angeles City Charter, Sec. 112 48

Los Angeles City Charter, Sec. 432 ..... 32, 33, 34, 36

Los Angeles City Ordinance No. 94004, Sec. 2 36

Los Angeles City Ordinance No. 94004, Sec. 4 36

Los Angeles City Ordinance No. 94004, Sec. 8 36

Los Angeles City Ordinance No. 94004, Sec. 9 66

Los Angeles City Ordinance No. 94004, Secs. 9-23 37

Missouri Constitution (amended June, 1865), Sec. 6 27

Rules of the Los Angeles City Board of Civil Service Commissioners, Rule XVII 4

United States Code, Title 28, Sec. 1257(3) 2

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United States Constitution, Art. I, Sec. 10 ..... 5, 9

United States Constitution, First Amendment 6, 8, 46, 51

United States Constitution, Fourteenth Amendment 6, 8, 46, 53

English Statutes

Act of Parliament, July 15, 1321 18

19 Caroline II 18

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1 Elizabeth, Chap. 1, Sec. 19 17

PAGE

3 Edward VI, Chap. 17 17
5 Elizabeth, Chap. I 16
1 George I 17
9 George I, Chap. 18 18
11 George III, Chap. 55 17
26 Henry VIII, Chap. 25, Sec. 2 17
26 Henry VIII, Chap. 25, Sec. 3 18
26 Henry VIII, Chap. 25, Sec. 7 18
28 Henry VIII, Chap. 12 17
28 Henry VIII, Chap. 18 18
32 Henry VIII, Chap. 60 17
33 Henry VIII, Chap. 20 17
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IN THE

Supreme Court of the United States

October Term, 1950.

No. 453.

RAY H. GARNER, HARRY BECKERMAN, AIDA BELDNER, JOHN B. BROWN, CARRIE L. DICK, MARY E. GRUNEWALD, EUGENE HALLETT, MARGARET B. HASKELL, EDWARD HAVENS, CORNELIUS LAWRENCE, VERA MANN, OLA ROSS PACIFICO, DANA PLATT, EUGENE REED, FRANCES SCHWARTZ, WILLARD SMART, FRANK TORREANO,

Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; CLARENCE J. DERRICK, JOSEPH O. DONOVAN, LOUIS M. DREVES, FRANK GILLELEN, EDWARD L. TAYLOR, and MILTON OFFNER, as Members of the Board of Public Works of the City of Los Angeles; BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; SAMSON A. LINDAUER, JUSTIN W. GILLETTE, CHARLES E. ARNN, RANSOM M. CALLICOTT, and MRS. IDA S. LAZARD, as Members of the Board of Civil Service Commissioners of the City of Los Angeles; DAN O. HOYE, City Controller of the City of Los Angeles; THE CITY OF LOS ANGELES, a Municipal Corporation,

Respondents.

BRIEF FOR PETITIONERS.

On certiorari to the District Court of Appeal, Second Appellate District, of the State of California, to review the decision of that Court rendered July 19, 1950 [R. 40], affirming the order of the Superior Court of the State of California, in and for the County of Los Angeles, entered May 25, 1949 [R. 33] denying petitioners' consolidated petitions for writ of mandate [R. 32-33]. A petition for rehearing in the District Court of Appeal was denied on August 8, 1950 [R. 38]. The Supreme Court of California denied a hearing on September 13, 1950, three Justices voting in favor of granting such a hearing [R. 47].

Opinion Below.

The Superior Court rendered no opinion. The opinion of the District Court of Appeal [R. 40-46] is reported in 98 Cal. App. 2d 493. The Supreme Court of California rendered no opinion in entering its order denying a hearing [R. 47].

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3) and 2101(c). This Court ganted certiorari March 5, 1951.

The judgment of the District Court of Appeal was entered July 19, 1950 [R. 40]. The order of the Supreme Court of California denying a hearing was entered September 13, 1950 [R. 47].

The constitutional issues here presented were argued in the trial court [R. 7-9]; they were argued before the District Court of Appeal on appeal [R. 40-46], and on petition for rehearing [R. 38]; and they were argued before the Supreme Court of California [R. 35-40] which Court declined to grant a hearing thereon [R. 47].

State Action Involved.

The issues presented in this case arise out of a compulsory oath and affidavit required of all city employees, as a condition of continued employment, by the City of Los Angeles. The contents of the oath and affidavit [R. 11-12] are embodied in Ordinance Number 94,004 [R. 11-18] adopted by the Council of the City of Los Angeles on October 21, 1948 [R. 11].[1]

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[1]Referred to hereafter as "the Ordinance."

Statement of the Case.

There are no disputed issues of fact. The decision of the District Court of Appeal overruled the petitioners' claims that the Ordinance deprived them of federal rights guaranteed by the Constitution of the United States [R. 40-46].

The petitioners' consolidated petitions [R. 1-27] sought restoration to their positions in the classified civil service of the City of Los Angeles from which they had been removed for their failure to comply with the requirements of the Ordinance.

Petitioners are citizens of the United States [R. 1] and permanent civil service employees of the respondent City of Los Angeles [R. 2]. The petitioners have been members of the classified civil service for many years, holding positions ranging from that of tree trimmer in the case of petitioner Reed to that of equipment operator in the case of petitioner Garner [R. 2].

On or about October 21, 1948, the Council of the City of Los Angeles enacted the Ordinance herein [R. 3]. The said Ordinance required employees of the City of Los Angeles to subscribe to an oath of loyalty which included, among other requirements, an affirmation that petitioners had not within a period of five years prior to the effective date of the Ordinance advised, advocated or taught the forcible overthrow of the Government of the United States or of the State of California, or been members of organizations which so advocated, and to execute an affidavit of past and present membership or non-membership in the Communist Party of the United States or the Communist Political Association [R. 18-21].

Fifteen of the petitioners declined to sign either the oath or affidavit [R. 4-5]; two of the petitioners, Ola Ross Pacifico and Frances Schwartz, did sign the oath but not the affidavit [R. 5]. All seventeen were discharged from their civil service employment [R. 4].[2]

The sole charge and ground for discharge was the failure to execute the required oath and affidavit, and in the case of the petitioners Pacifico and Schwartz, the sole charge and ground for discharge was the failure to execute the required affidavit [R. 4-5]. No other charge or ground for discharge of any petitioners was ever asserted or claimed.

Following hearings before the respondent Board of Civil Service Commissioners held on February 10 and February 18, 1949, that Board on March 2, 1949, by one notice addressed to counsel for all seventeen petitioners, sustained each and all of the discharges [R. 25-26].

Each petitioner duly filed a claim for unpaid salaries and an application for reinstatement [R. 6]. On or about March 15, 1949, both the request for unpaid salary and the application for reinstatement were denied by respondents pursuant to the Ordinance [R. 6].

It is alleged in the verified petition and not denied that "but for the matter of asserted failure to comply with the provisions of Ordinance Number 94,004, petitioners

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[2]Rule XVII of the respondent Board of Civil Service Commissioners of the City of Los Angeles provides in part as follows: ". . . but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause which shall be stated in writing by the board or officer having the power to make such removal, discharge of suspension, and filed with the Board of Civil Service Commissioners . . ." None of the petitioners was such an unskilled laborer employed by the day.

each performed the services required of him in a competent and satisfactory manner; and petitioners were at all times herein mentioned fit and suitable persons to fill the positions from which they were removed" [R. 6].

As above stated, the petition for writ of mandate was denied by the trial court without opinion; the order of denial affirmed by the District Court of Appeal, Second Appellate District, with opinion; and a petition for hearing denied by the Supreme Court without opinion, three Justices dissenting.

The decision of the court below [R. 40-46] stressed that the "issues involved in this case have been set forth and disposed of in *Steiner v. Darby*, 88 Cal. App. 2d 481" [R. 42]. The court declared that "one of the foundation stones of private business is that the employee must be loyal to his employer" [R. 45] and that "so long as the employment continues, every employer has the right at any time to ask his employee to declare his loyalty" [R. 45]. The court felt that "it is an interesting question whether the legislative power may require disclosure or disavowal of mere beliefs or opinions, without overt acts" [R. 46]. The court concluded that the enactment of the Ordinance was constitutionally within the legislative competence.

Questions Presented.

1. Whether, on its face or as applied in this case, the Ordinance constitutes a bill of attainder and *ex-post facto* law in violation of Article I, Section 10 of the Constitution.

2. Whether, on its face or as applied in this case, the Ordinance deprives petitioners of the liberties of freedom of thought, speech, assembly, association, the right

to privacy of conscience, and the right to petition for redress of grievances, without due process of law in violation of the First and Fourteenth Amendments to the Constitution.

Summary of Argument.

The Ordinance enacted by the Council of the City of Los Angeles is unconstitutional as a bill of attainder and *ex-post facto* law. The reasons for the specific and complete prohibitions against bills of attainder in the federal system lie in the evils of the practices of attainder in English and early American history. These oppressive laws with which the framers of the Constitution were well acquainted, varied in form and content. The persons attained might be specifically named, described as a class, or not named at all. These legislative judgments would include convictions for offenses which ranged from the most heinous to the less serious. The victim was often denied any opportunity to be heard. The judgments might be absolute or conditional. The punishment included death, forfeiture, banishment, disqualification from office, imprisonment, or lesser penalties. The existence of the power in a legislature to enact bills of attainder was held by the founding fathers to be incompatible with the system of government which they created. Express prohibitions were laid upon such measures in the Constitution because they were contrary to the principle of separation of powers, denied to citizens due process of law, the equal protection of the laws, right of trial by jury, substituted the inquisitorial system for the accusatorial system, and arbitrarily imposed punishments and penalties. The decisions of this Court in *Cummings v. Missouri* and *Ex parte Garland*, consistent with the letter and spirit of the Constitution, struck down the provisions for expurgatory oaths

contained in the Missouri statutes. This Court held that the deprivation of any civil right may be punishment, that all avocations are alike open to everyone, and that any deprivation or suspension of any of these rights for past conduct is punishment. The Missouri statutes were held by this Court to presume the guilt of persons and to adjudge the deprivation of their rights unless the presumption be removed by an expurgatory oath. The measures were held by this Court to be bills of attainder and *ex-post facto* laws. There is no essential difference between the Ordinance here and the enactments condemned by this Court in *Cummings v. Missouri* and *Ex parte Garland*. The Ordinance inflicts punishment without the slightest semblance of hearing or trial. The decisions of this Court in *Dent v. West Virginia* and *Hawker v. New York* dealt only with the general power of a state to prescribe qualifications for office. In each of these cases, there could be no disqualification without some form of hearing where judicial safeguards were provided. No expurgatory oaths were involved.

The City of Los Angeles was without constitutional power to require the test oath and affidavit set forth in the Ordinance and petitioners' discharge for failure to execute the said oath and affidavit deprived petitioners of freedom of speech, press, assembly, association and the right to petition without due process of law in violation of the Fourteenth Amendment. In *West Virginia State Board of Education v. Barnette*, this Court held that a state was without power to compel an individual to communicate by word and sign his adherence to government as presently organized. This Court held that compulsion to swear such an oath of adherence was not a lawful means for attaining national unity. A similar adherence and

loyalty is sought here through the medium of a compulsory test oath. The oath and affidavit seek to compel perpetual loyalty to government by extracting a sworn oath that the individual has never in the past and never will express the idea of revolutionary change in government. Compulsory loyalty oaths have no place in the American constitutional system. The history of both England and America is marked by the struggles of men to free their minds from governmental coercion. The American conception of political freedom is that the people are the ultimate source of all political power; that the form of government is republican; and that the powers of government are defined and limited in fundamental constitutional laws designed to safeguard the individual citizen against excessive or arbitrary power. The freedoms embodied in the First and Fourteenth Amendments are entirely withdrawn from governmental control. They are indispensable in a government which exists by consent of the governed. There is no power in government to compel the loyalty of citizens, as this Ordinance does, by suppressing beliefs and opinions that government should be changed. The idea of revolutionary change is imbedded in American tradition and is a fixed constitutional tenet. The right to pursue an avocation or public calling is a fundamental right of all citizens and the exercise of this right cannot be clogged with conditions that are repugnant to their constitutional liberties. A state does not have unlimited police power with respect to its citizens, or any class of citizens. There are limits marked by the Constitution. Even if the inculcation of loyalty of citizens in government employ is a permissible end, the instrumentality of the compulsory test oath is not a lawful means for obtaining such a result in the light of the liberties secured by the Fourteenth Amendment.

ARGUMENT.

I.

The Ordinance Enacted by the Council of the City of Los Angeles Is Unconstitutional as a Bill of Attainder and Ex Post Facto Law.

It is provided in Article I, Section 10 of the United States Constitution that "No State shall—pass any bill of attainder, *ex post facto* law. . . ." A similar limitation upon the federal government is also contained in the fundamental law. Article I, Section 9, cl. 3. The reasons for this specific and complete prohibition in the federal system lie in the evils of the practices of attainder in English and early American history with which the members of the Constitutional Convention were well acquainted, and in the underlying postulate of the Convention that the United States would be a republican form of government, one prerequisite of which was the separation of exclusively judicial power from the legislative agencies of government.

> "Why did the authors of the constitution turn their attention to this subject, which, at the first blush, would appear to be peculiarly fit to be left to the discretion of those who have the police and good government of the state under their management and control? The only answer to be given is, because laws of this character are oppressive, unjust and tyrannical; and as such, are condemned by the universal sentence of civilized man."
>
> *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, 266.

> "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of these rules to individuals in society would seem to be the duty of other departments."
>
> *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 136.

A. Background of the Provisions Against Bills of Attainder and Ex Post Facto Laws.

1. The variety of forms which bills of attainder and bills of pains and penalties took in the enactments by Parliament precludes the view that there was any "classical" model of this evil so universally condemned at the Constitutional Convention. Hatsell, John, Precedents of Proceedings in the House of Commons (Lond. 1796), vol. IV, pp. 77-93. The persons attained might, as shall hereafter be shown, be specifically named, described as a class, or not named at all. The judgments of Parliament would include convictions for offenses which ranged from conspiracy through such substantive crimes as treason, misprision of treason, poisoning or attempted poisoning, adultery, desertion and other related offenses. In some cases, Parliament would offer the alleged offender some opportunity to defend, before the enactment of the law; in other cases, the victim was specifically denied any opportunity to be heard. Some laws declared judgment absolute; other laws declared persons guilty of the offenses unless upon a certain day they appeared and proved their innocence. The punishment might be death, corruption of blood, forfeiture, banishment, disqualification from office, imprisonment, or lesser penalties. Hatsell, John, Precedents of Proceedings in the House of Commons, *supra*. "After the precedent had been introduced, they went on through the whole of this reign attaining persons in a summary general way. the number of which it would be tedious and disgusting to recount." Reeves, John, History of the English Law (Lord. 1787), Ed. 2, vol. IV, p. 410.

The word *attaint* appears early in English history in two separate aspects. The writ of attaint appeared as early as 1202. Holdsworth, William, A History of English Law

(Bost. 1938), 6th Ed. vol. 1, p. 337. "When the character of the jury as witnesses was more prominent than their character as judges of the facts, they were obviously guilty of something like perjury if they gave a false verdict. It was to punish jurors who had thus perjured themselves that the writ of attaint was invented." Holdsworth, William, A History of English Law, *supra*, p. 337. "And seeing all trials of real, personal and mixed actions depended upon the oath of twelve men, prudent antiquity inflicted a strange and severe punishment upon them, if they were attainted of perjury." Coke's First Institutes (Thomas, Lond. 1818), vol. III, p. 510. The writ of attaint, however, was issued by the chief justice at a general Eyre or by the Chancellor only when a *prima facie* case was made out, and the original jury could not be attainted, except after trial and verdict by a second jury known as the attainting jury. When in subsequent times the jurors lost their character as witnesses and took on the form of the modern jury the writ of attaint fell into disuse. "The greatest changes in the law as to attaint were due, firstly, to the extension of the remedy by the legislature, and, secondly, to the growth of a disinclination to treat the jury merely as witnesses." Holdsworth, William, A History of the English Law, *supra*, p. 339.

However cruel and oppressive may have been the practice of attainting juries for "false" or "corrupt" verdicts, it is important to observe that the common law withheld any punishment until there had been a trial before a second jury. In England, the common law courts would render judgments of convictions in many other cases where attainder would flow as a consequence, but this occurred only upon a judgment rendered after trial and upon conviction. "He is then called attaint, *attinctus*, stained or blackened."

Blackstone's Commentaries (Lond. 1818), Book IV, p. 380.

Moreover, until the reign of Henry VIII, the attainders in parliament usually were preceded by some notice to the alleged offender, and even opportunity to defend or be defended. Reeves states that bills of attainder were resorted to "either to confirm a sentence already passed in some court of law; or to ensure the destruction of such as might possibly escape by the openness of a common-law trial." History of English Law (Lond. 1787), Ed. 2, vol. IV, p. 408. There is mention in the text books of the appearances of witnesses, examinations by Star Chamber, and pleas before the House before the passage of a bill of attainder.

It was, however, in the twenty-ninth year of the reign of Henry VIII, that a new practice of attainting persons was introduced. The King desired the destruction of the Countess of Salisbury who had become personally obnoxious to him because of her religious leanings. Charges of various kinds were drawn up against her. "These charges, however, could not be sufficiently proved, might be invalidated by her, or would not reach her life. This determined the King to procure her destruction in a more decisive and summary way than had been hitherto used." Reeves, John, A History of English Law, *supra*, p. 409.

Cromwell was dispatched by the King to consult the judges as to whether parliament could attaint persons without trial or citing them to appear and defend themselves. The judges answered "that it was a dangerous question; and that the High Court of Parliament ought to give examples to inferior courts for proceeding according to justice; and that no inferior court *could* do the like; and they thought the High Court of Parliament,

would never do it." Hatsell, John, Precedents of Proceedings in the House of Commons (Lond. 1796), vol. IV, p. 85, footnote. The King, however, commanded a more explicit answer from the judges. Their reply was, "That if he be attainted by Parliament, it could not come in question afterward, whether he were called or not called to answer." Hatsell, *supra*, p. 86, footnote. Reeves, John, History of the English Law, *supra*, p. 409. The floodgates had been opened.

So callous did this procedure become that the Lord Chancellor could declare to both Houses that a bill of attainder against the Duke of Norfolk must be expedited without delay because "the King wished to confer the offices which the Duke held, chose some other person, who might execute the same at the approaching ceremony of the coronation of his son Edward, Prince of Wales." Hatsell, *supra*, p. 86, footnote.

Thus, until Henry VIII's reign it had not been clear that the law would admit the validity of an Act of Attainder passed without hearing the accused in his defense. "But in Henry VIII's reign it was realized that Acts of the Parliament, whether public or private, were legislative in character; and the judges were obliged to admit that these Acts, however morally unjust, must be obeyed." Holdsworth, William, A History of English Law (Lond. 1924), Vol. IV, p. 185. Blackstone, though probably recognizing the validity of this proposition, could not refrain from writing: "As for acts of parliament to attaint particular persons of treason or felony, or to inflict pains

and penalties, beyond or contrary to the common law, to serve a special purpose, I speak not of them; being to all intents and purposes new laws, made *pro re nata*, and by no means an execution of such as are already in being." Commentaries (1818), Book IV, p. 259.

Of the particular examples of bills of attainder and bills of pains and penalties, a few may be noted here. Macauley relates (History of England (Lond. 1914), vol. 3, pp. 1503-1506) how the great Act of Attainder was enacted by the Irish Parliament, with the assent of King James:

> "A list was framed consisting between two and three thousand names. At the top was half the peerage of Ireland. Then came baronets, knights, clergymen, squires, merchants, yeomen, artisans, women, children. No investigation was made. Any member who wished to rid himself of a creditor, a rival, a private enemy, gave in the name to the clerk at the table, and it was generally inserted without discussion . . . Days were fixed before which those whose names were on the list were required to surrender themselves to such justice as was then administered to English Protestants in Dublin . . . That nothing might be wanting to the completeness of this great crime, extreme care was taken to prevent the persons who were attainted from knowing that they were attainted, till the day of grace fixed in the Act was passed. The roll of names was not published, but kept carefully locked up in Fitton's closet. Some Protestants, who still adhered to the cause of James, but who were anxious to know whether any of their friends or relations had been proscribed, tried hard to obtain a sight of the list; but solicitations, remonstrance, even bribery, proved vain. Not a single copy got abroad till it was too late for any of the thousands who had been condemned without a trial to obtain a pardon."

That bills of attander were used indiscriminately by friend and foe alike, dependent upon the political weather, is clear from a reading of English history. Thus, an adherent of King James, Sir John Fenwick, was put to death upon judgment of conviction by an Act of Parliament in the reign of William, The Third. Macauly, History of England, *supra,* vol. 6, p. 2687. Fenwick, as a matter of fact, had been indicted by a grand jury and charged with high treason. Before trial, however, one of the two witnesses against Fenwick disappeared.

> "This event exasperated the Whigs beyond measure. No jury could now find Fenwick guilty of high treason. Was he then to escape? Was a long series of offenses against the State to go unpunished, merely because to those offenses had now been added the offense of bribing a witness to suppress his evidence and to desert his bail? Was there no extraordinary method by which justice might strike a criminal who, solely because he was worse than other criminals was beyond the reach of the ordinary law? Such a method there was, a method authorized by numerous precedents, a method used both by Papists and by Protestants during the troubles of the sixteenth century, a method used both by Roundheads and by Cavaliers during the troubles of the seventeenth century, a method which scarcely any leader of the Tory party could condemn without condemning himself, a method of which Fenwick could not decently complain, since he had, a few years before, been eager to employ it against the unfortunate Monmouth. To that method the party which was now supreme in the State determined to have recourse."
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> Macauley, *supra,* vol. 6, p. 2660.

The method, of course, was Bill of Attainder. The House dispensed with the testimony of two witnesses. It heard one, and took secondary evidence of the other. Fenwick offered no evidence in his behalf. Whigs and Tories debated the "verdict" with an eye to the populace, rather than the evidence. In vain did the friends of Fenwick "set forth the danger of breaking down the partition which separates the functions of the legislator from those of the judge," *supra*, p. 2669. The answer of the Tories was exemplified by this statement in the House, ". . . in order that the fear of a righteous punishment may restrain those enemies of our country who wish to see him [James] ruling in London as he ruled at Dublin, I give my vote for this bill." *supra*, p. 2672.

The variety of forms which bills of attainder assumed may be further noted by particular statutes set forth hereafter which in some manner bear upon the issues involved herein. Death was not always the consequences of an attainder. By stat. 16, Rich. II, ch. I, the penalty ordained was that the offenders were to be put out of the King's protection, to forfeit their lands and goods, to be detained and imprisoned at the King's pleasure; and if the offenders were not found they were to be outlawed.

By the act of 5 Eliz. ch. I, it was enacted "that every person, who by writing, printing, teaching, preaching, or by deed or act setting forth and maintaining the jurisdiction and power of the bishop of Rome, etc., their aiders and abettors, should incur the penalties prescribed by statute of 16 Rich. II. By sec. 5, all officers in the Kingdom of every description, all officers in the church, all persons admitted to degrees in the universities, all schoolmasters and public and private teachers of children, were to take the oath of abjuration and allegiance prescribed by Stat.

1 Eliz. ch. 1, sec. 19; and by sec. 8 it was provided that all persons refusing to take such oaths, and convicted or attainted at any time thereafter, should suffer the penalties prescribed by statute of 16 Rich. II; and by sec. 10 for refusing to take such oath when tendered the second time, they were to suffer the penalties of treason.

The attaints were not always for the usual acts of treason. Act 28 Henry VIII, ch. 12 attainted Elizabeth Buxton and others for slandering the divorce of Henry from Catherine of Aragon and his marriage with Anne Boleyn. Act 33 Hen. VIII, ch. 20 attainted Queen Catherine Howard for incontinence, and forfeited the property of herself and her accomplices to the King. Act 3, Ed. VI, ch. 17, confirmed the attainder of William Sherrington for counterfeiting the coin. Thomas Cromwell, Earl of Essex, 32 Henry VIII, ch. 60, was attainted for heresy. By Act 11 George III, ch. 55, J. Burnett and sixty-seven others named were incapacitated from voting at elections for members of Parliament. By stats. 9 and 10 William III, ch. 32, any person who denied the truth of the State religion or the divine authority of the Scriptures, was for the first offense rendered incapable to hold any office or place of trust; and for the second, rendered incapable of bringing any action and subjected to imprisonment without bail. By stat. 1, George I, refusing or neglecting to take certain prescribed oaths, was punished by incapacity to hold any public office; to prosecute any suit; to be a guardian; to take any legacy; to vote at any election; and the offender was also subject to a forfeiture of five hundred pounds to anyone who would sue for the same.

The attainder of Thomas Fitzgerald, Earl of Kildare (26 Henry VIII, ch. 25) attainted, first, the Earl, and deprived him of his estates, titles, etc. Section 2 declared

that all "comfortors, partakers, abettors, confederates and adherents" shall likewise stand attainted. By Section 3, it was provided that the same attainder against the said abettors, etc., shall be as effectual as if they had been "particularly named by their proper names and surnames in this said Act." Section 7 provided that the attainder is not to be "hurtful or prejudicial" if they submit by a presignified day to the King or his lieutenant. Some two years later, another bill of attainder (28 Hen. VIII, ch. 18) against the same Thomas Fitzgerald and his uncles omitted the former section 7.

The statute 19, Car. II adjudged the Earl of Clarendon a banished man for life, if he did not return to England within a certain period and surrender himself for trial. 9 Geo. I, ch. 18 ordered Bishop Atterbury to deport the realm on or before a fixed day; sentenced him to perpetual exile and deprived him of all his offices, dignities, etc. By an Act of Parliament (July 15, 1321), after reciting several crimes committed by a father and son, Parliament disinherited them forever and banished them never to return unless by assent of the King (Hatsell, *supra*, p. 91). In January, 1549, a bill was passed disinheriting for life William West, for having attempted to poison the Lord Larran (*supra*, p. 92). On March 7, 1556, a bill debarred the divorced wife of the Earl of Sussex from her dower "in case she shall not repair into the Realm, within a time limited, and make her purgation before the Bishop of her diocese." (*Supra*, p. 92.)

It will thus be observed that bills of attainder and pains and penalties in England varied considerably in form and content. Even if the crimes were fully established to the satisfaction of Parliament, new innovations were made respecting such crimes. Neglect to surrender by an appointed

day constituted a new treason against which the attaint was directed. In other cases, as in the persecution of the Earl of Strafford, a statute would determine those things to be treason which by no prior law or adjudication could be or had been so declared. The case of Sir John Fenwick illustrates the energy of legislative power exerted on the rules of evidence. In many other instances, the legislature created new innovations in the punishments inflicting forfeitures or disabilities not incurred in the ordinary courts of law. Wooddeson, Richard, A Systematical View of the Laws of England (Vinerian Lectures) Lond 1792, Vol. 2, pp. 625-640. The learned author, concluding his lecture on bills of attainder and bills of pains and penalties, observed:

> "It must be admitted, that in all penal statutes passed *ex post facto*, except where the innovation *mollifies* the rigor of the criminal code, justice wears her sternest aspect. Moral conscience and human frailty have no longer the additional guidance of the law. . . . All civil magistracies have in reason their appointed province. The Legislature ought not to intrench on the judicial. . . . Hence the political congruity of first enacting laws, and then enforcing them on subsequent occasions, and by different magistrates, has been confirmed by the constant usage of the world; in the observance of which, the subjects of every state have been thought deeply interested. . . . The extravagant author of Leviathan writes that traitors, like public enemies, may be punished in an arbitrary manner. . . . But here the same dangerous latitude of sudden discretion is exercised, unless an express and general law had previously defined by what particular acts a citizen might become *bostis reip.* And what particular treatment he should ac-

cordingly receive. . . . Discretionary severities inflicted by particular statutes, would probably be both inexpedient and unjust."

Wooddeson, supra, pp. 641-646.

2. American colonial and revolutionary history is also a part of the background which affected the thinking of those who gathered at the Constitutional Convention in 1787. "They had lived through bitter years, when they had seen Governments, both Royal and State, trample on the human rights which they and their ancestors in the Colonies and in England had fought so hard to secure. In the seven years prior to the signing of the Federal Constitution, they had seen the Legislatures of four States—New Jersey, Rhode Island, New Hampshire and North Carolina—deprive their citizens of the right to jury trial in civil cases. They had seen the State Legislatures of Virginia, Pennsylvania and other States pass bills of attainder sentencing men to death or banishment without a criminal trial by jury." Warren, Charles, Congress, The Constitution and The Supreme Court (Bost. 1930), p. 81.

The fact is that during the American Revolution, so intensified was popular feeling, every one of the thirteen colonies enacted bills of attainder against the Loyalists.[8] The form and content of these measures were as varied as those which had existed in England, and as arbitrarily and ruthlessly enforced. Legislation was passed in every state declaring the loyalists "guilty of such atrocious and

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[8]The statutes are collected in Van Tyne, C. H., The Loyalists in the American Revolution (N. Y. 1902), Appendix. The author notes (p. 330): "Disfranchisement and removal from office were common penalties in the Revolutionary Days." See also, Thompson, J. W., Anti-Loyalist Legislation During the American Revolution, in 3 Ill. L. Rev. 81, 147 (1908).

unnatural crimes against their country that every friend of mankind ought to forsake and detest them." The punishment was confiscation of all their property. Thompson, J. W., Anti-Loyalist Legislation During the American Revolution in 3 Illinois Law Rev. 81, 147.

Massachusetts set the pattern, later followed by other states, of prescribing an oath of fidelity and allegiance, and persons refusing to take the same were to be committed to prison and deported within forty days. (Thompson, J. W., *supra,* p. 148.) Interdiction by name was frequent. By the famous Act of banishment of September, 1778, 308 persons were banished. "It is well that Massachusetts was fertile in able men. Few commonwealths could have borne so large an excision of its intelligent and industrious population." Thompson, J. W., *supra,* p. 149, New Hampshire proscribed seventy-six citizens and confiscated the property of twenty-six of them. New York authorized the "commissioners of conspiracies" to cause persons of neutral and equivocal character in the state to take an oath or affirmation of fealty to the new government and on refusal to send them within the enemy's lines and to double forever all taxes on their lands. (*Supra,* p. 153.) Loyalists were punished for remaining on territory overrun by the British and declared to be "without the protection of the laws." "In effect this act expelled a large number of citizens without a hearing and disfranchised them in the face of the constitution [New York], without the judgment of their peers and contrary to the law of the land." *Supra,* p. 153.

The measures ran the gamut. Not a single profession, business or trade was left untouched. Failure to take all kinds of oaths of loyalty and fidelity resulted in deprivation of office, profession or trade, imprisonment, confiscation and banishment. Laws were passed specifically depriving persons of their office by name. New York required lawyers to produce a certificate of attachment to the "liberties and independence of America." Those who failed to do so had their licenses suspended. Laws were passed in a number of states attaining "divers traitors" unless they surrendered to the state authorities before a given date.

Van Tyne, C. H., The Loyalists in the American Revolution (N. Y. 1902).

When peace was concluded between the United States and Great Britain, the preliminary articles provided for the restoration of confiscated property and the prohibition of further prosecutions. This was more honored in the breach than in the observance. Jay wrote to Elbert Benson from Europe in 1783:

> "Your irregular and violent popular proceedings and resolutions against the Tories hurt us in Europe. We are puzzled to answer the question, how it happens that if these be settled governments in America, the people of town and district should take upon themselves to legislate." Thompson, J. W., *supra*, p. 1 7.

3. It was in the light of this background that the constitutional provisions were adopted. (Cooley, Thomas M., Constitutional Limitations (Bost. 1927), 8th ed., Vol. 1, pp. 536-540.) The decision of the Constitutional Conven-

tion to insert a prohibition against bills of attainder, both as to the federal and state governments, was adopted without dissent. Debates in the Federal Convention reported by James Madison (New York, 1920), Hunt & Scott Int. ed., pp. 449, 567. "The conviction of the propriety of this constitutional provision has been so universal, that it has never been questioned, either in legislative bodies or elsewhere." Cooley, Thomas M., *supra*, Vol. 1, p. 539.

It is clear that the existence of the power to enact bills of attainder was incompatible with the entire system of government which the founding fathers created. There was implicit in such measures a complete failure of due process, denial of equal protection of the laws, denial of the right of trial by jury, the substitution of the inquisitorial system for the accusatorial system, arbitrary imposition of punishment and penalties—in short, a despotism of men and not a government of laws. And this was all the more despicable, in the opinion of the founding fathers, because all of this was accomplished through the guise of a "law." As Madison stated,

> "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security, and private rights; and I am much deceived if they have not, in so doing, as

faithfully consulted the genuine sentiments as the undoubted interests of their constituents." The Federalist, No. XVIV.[4]

In thus making a clear sweep of the sanguinary and oppressive relics of the past, it is safe to say in the light of history and the harmonizing sentiments of the day that the framers of the Constitution intended that no punishment, penalty or disability, great or small, total or conditional, immediate or suspended, should be imposed under our law except through action by some agency exercising judicial powers and observing the rules and safeguards of fair hearing and trial. The legislature was not to adjudicate individual causes, civil or criminal, or to impose upon named or identified individuals or groups punishment, penalty or disability of any kind. If the legislatures of the several states, or the federal government, could subvert this principle, directly or indirectly, the union would be dissolved.

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[4]When Madison wrote that bills of attainder were "prohibited by the spirit and scope" of all the state constitutions, it was clear that he was referring principally to the doctrine of separation of powers. In subsequent issues of the Federalist No. XLVII and No. XLVIII, he stressed that the system of checks and balances created by the Constitution did not violate the principle, but were intended to prevent encroachment by one arm of government upon another. He agreed that "the accumulation of all powers, legislative, executive and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." No. XLVII. This pervasive truth has also marked the decisions of this Court. "The doctrine of separation of powers is fundamental in our system. It arises, however, not from Art. 3 nor any other single provision of the Constitution, but because 'behind the words of the constitutional provisions are postulates which limit and control.'" *National Mutual Ins. Co. v. Tidewater T. Co.*, 337 U. S. 582, 590. See also, Green, Frederick, Separation of Governmental Powers in 4 Selected Essays on Constitutional Law (1938), Book 4, pp. 195-218; Pound, Roscoe, Justice According to Law, in 14 Col. L. Rev. 1, 7-11 (1914).

B. The Decisions of This Court in Cummings v. Missouri and Ex Parte Garland.

The year when these two landmark decisions were rendered by this Court was 1866. In the eighty-five years which have passed since the rendition of these opinions this Court has never failed to reaffirm their validity. This has been true of majority and differing opinion alike. See, for example, *United States v. Lovett*, 328 U. S. 303. No dispassionate examination of the constitutional history of America and England can lead to any other conclusion but that these decisions were consistent with the intent of the founding fathers and the spirit and letter of the constitutional prohibition.

The decisions were rendered under circumstances which put to the test the very principles which the constitution had ordained should govern all society. A great Civil War had just ended. Hostility towards those who had participated or sympathized with the rebellion was intense. How were these disloyal elements to be punished for their alleged offenses? In most cases, there was no evidence to support any criminal charge. Many of the acts with which they were charged had never been deemed criminal. Witnesses were not available. Only one method remained—the method of attainder.

We consider the crux of this Court's decisions in the *Cummings* and *Garland* cases to lie in the following portion of the decision:

> "The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name It intended that the rights of the citizen

should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be ended by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." (P. 325.)[5]

For the statutes which were enacted in 1866 were in fact the crudest versions of bills of pains and penalties to appear in the long history of measures of that type. The statutes were clearly intended to inflict the penalty of disqualification from office upon identified classes of persons because, in the judgment of the legislature, they had committed criminal offenses—or offenses which ought to be called criminal. By force of the statute, the victims were ferretted out and because of their "misdeeds," perpetually excluded from their chosen avocations. In all of this, not the slightest opportunity to defend or be heard was offered. Parliament under James or Henry in many cases was more

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[5]This Court has emphasized that when the intent, operation or effect of a statute is to evade constitutional limitations, the statute will not be upheld, no matter what device or form of legislative enactment is utilized. It is not a question of the personal motivations of the legislators nor the alleged lawfulness of purpose. It is not to be expected that anyone will ever candidly concede the intent to violate the fundamental law; indeed, he may believe that he has no such purpose. "It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*" *Boyd v. United States*, 116 U. S. 616, 635. If this were not so, life, liberty and property would be subject to deprivation without due process of law by every subterfuge which the ingenuity of man can devise and this Court's function under the Constitution would become meaningless. This is the basic rationale of such decisions by this Court as *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Collins v. New Hampshire*, 171 U. S. 30; *Fairbanks v. United States*, 181 U. S. 283; *Bailey v. Alabama*, 219 U. S. 219; *Macallen Co. v. Massachusetts*, 279 U. S. 620; *United States v. Constantine*, 296 U. S. 287; *Near v. Minnesota*, 283 U. S. 697; *Grosjean v. American Press Co.*, 297 U. S. 233. See, concurring opinion of Justice Jackson in *Thomas v. Collins*, 323 U. S. 516, 547.

moderate than this. Despite the arguments of counsel for the State in the *Cummings* and *Garland* cases (state's rights; police powers; privilege; expediency; security of the State, pp. 295-306, 352-364), this Court recognized that behind the facade of the statute lay a plain violation of the Constitution.

The Constitution of Missouri was amended in June, 1865. By the amendments all those persons in the State of Missouri who had ever actively aided or abetted the rebellion, or sympathized therewith, or "been a member of, or connected with any order, society or organization, inimical to the government of the United States" were held incapable of holding office, of acting as a teacher, of holding real estate, of managing a corporation, etc. (p. 279-280). The intent of the law was manifest.

By another section added to the Constitution (Sec. 6) an Oath of Loyalty was prescribed. Included in it was the affirmation that the Constitution, as amended in 1865, had been read by the affiant and that he had "never, directly or indirectly, done any of the acts in said section specified." (P. 280.)

By a third section (p. 281) it was provided that all the classes of persons mentioned in the Constitution within sixty days after the effective date should subscribe the Oath of Loyalty. Failure to comply resulted in immediate vacancy in the office. It was made punishable to practice one's profession without having taken the oath, and a false oath was declared to be perjury. These provisions are noted because of the bearing they have upon the Ordinance involved here.

The following propositions were set forth by this Court:

1. The deprivation of any rights, civil or political, previously enjoyed may be punishment, the circumstances attending and the causes of the deprivation determining the fact.

2. All avocations are alike open to every one, and that in the protection of those rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment.

3. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. These bills may be directed against individuals by name; but may be directed against a whole class.

4. The amendments to the Constitution of Missouri in plain operation and effect presume the guilt of persons, adjudge the deprivation of their right to their professions unless the presumption of guilt be removed by an expurgatory oath. The measure is a bill of attainder.

5. The legal result is the same whether the legislature openly adjudges guilt or covertly assumes it.

6. The Constitution of Missouri punishes acts previously innocent; imposes additional punishment for existent offenses; subverts the presumption of innocence and alters the rules of evidence which govern all common law countries—the accusatorial and not the inquisitorial method. The law is, therefore, an *ex post facto* law.

Justice Field, in answer to the argument of the State that the statute merely prescribed qualifications for office, noted that many of the acts named in the statute appeared to have no relation to fitness for office. This was one aspect which convinced this Court that the measure was intended to inflict punishment upon individuals. But it was not the sole aspect, nor the crucial one. This Court emphasized (pp. 328 and 329) that even if the criminal offenses were separated from the acts deemed innocent, and enacted into two separate laws, still the intent to inflict a penalty would remain. "They impose the same penalty without the formality of a judicial trial and conviction; for the parties embraced by the supposed enactments would be incapable of taking the oath prescribed; to them its requirement would be an impossible condition." (P. 329.)

This emphasis was repeated in the *Garland* case:

> "The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character." (P. 377.)

As Justice Frankfurter observed in his concurring opinion in *United States v. Lovett*, 328 U. S. 303, 327:

> "While the provisions involved in those cases did not condemn or punish specific persons by name, they proscribed all guilty of designated offenses. Refusal to take a prescribed oath operated as an admission of guilt and automatically resulted in the disqualifying punishment. Avoidance of legislative proscription for guilt under the provisions in the *Cummings* and *Garland* cases required positive exculpation. That the persons legislatively punished were not named was a mere detail of identification. Congress and the Missouri legislature, respectively, had provided the most effective method for identification."

And in *American Communications Association v. Douds*, 339 U. S. 382, this Court again stated (p. 414):

> "In the cases relied upon by the unions on the other hand, this Court has emphasized that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result."

The essential holding of the *Cummings* and *Garland* cases, it is respectfully submitted, is that it is not within the province of a legislature to impose penalties or disabilities upon named persons, or easily identifiable persons for conduct deemed by the legislature to be inimical to the State. Such conduct may or may not have relation to fitness for office, be innocent or criminal, but if the parties are to be excluded from their professions because of such conduct, then the penalty can only be imposed by some

agency exercising judicial powers and observing the rules and safeguards of fair hearing and trial.[6]

C. The Ordinance Enacted by the City Council of the City of Los Angeles.

There is no essential difference between the Ordinance here and the enactments condemned by this Court in *Cummings v. Missouri* and *Ex parte Garland*. The plain operation and effect of the Ordinance, on its face, demonstrates a legislative purpose to inflict punishment without a judicial trial.

Before proceeding to an analysis of the measure, we would respectfully call the attention of the Court to the following allegation in petitioner's application [R. 1-27] for a writ of mandate [R. 6]:

"X.

"Since the date of their discharges, petitioners have not been employed in their regular positions, or in any position, for the City of Los Angeles, but on the

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[6]See also, *In re Shorter* (D. C. Ala. 1865), Fed. Cases No. 12,811; *Ex parte Law*, 35 Ga. 285, Fed. Cases No. 8,126; *Green v. Shumway*, 39 N. Y. 418, 36 How. Pr. 5; *Murphy and Glover Test Oath Cases*, 41 Mo. 340; *State v. Heighland*, 41 Mo. 388. The cases are collected in the annotation in 86 L. Ed. 1267-1294. While exclusion from office without judicial hearing because of past conduct is conclusive evidence of an intent to inflict punishment, it does not follow that exclusion without judicial hearing for present and future conduct may not also reflect such intent. If a statute required all federal judges to take an oath that they are not over 45 years of age, and that failure to take the oath would result in dismissal, it would be an attainder. If an ordinance required all employees to take an oath that they are not members of the Jewish faith, and failure to take the oath resulted in dismissal, that, too, would be an attainder. The importance of emphasizing past conduct is that it patently establishes the intent to inflict punishment, coupled, of course, with the failure to provide any judicial hearing before the punishment.

contrary have been refused work and are not now permitted to work and are not now working for said respondent, City of Los Angeles, in any position.

"That but for the matter of asserted failure to comply with the provisions of Ordinance Number 94,004, petitioners each performed the services required of him in a competent and satisfactory manner; *and petitioners were at all times herein mentioned fit and suitable persons to fill the positions from which they were removed.*" (Emphasis supplied.)

This allegation is admitted by the pleadings. It is thus admitted, at least by the pleadings, that the doctrines and affiliations proscribed in the Ordinance have no relation to the fitness of the petitioners to fill the positions from which they were removed. This is a preliminary aspect of the question as to whether the Ordinance here is intended to inflict punishment without judicial trial.

The preamble in the Ordinance [R. 11] declares that it is an ordinance "to effectuate the provisions of Charter Section 432 and otherwise to insure the loyalty of the officers and employees of this City." The manifest intent of the Ordinance is, therefore, at least to carry out the provisions of the Charter.

Section 432 of the Los Angeles City Charter provides:

"Notwithstanding any other provisions of this Charter, no person shall hold or retain or be eligible for any public office or employment in the service of the City of Los Angeles, in any office or department thereof, either elective or appointive, who has within five (5) years prior to the effective date of this section advised, advocated or taught, or who may, after this section becomes effective, advise, advocate or teach, or who is now or has been within five (5) years

prior to effective date of this section, or who may, after this section becomes effective, become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period of five (5) years advised, advocated, or taught the overthrow by force or violence of the government of the United States of America or of the State of California.

"Insofar as this section may be held by any court of competent jurisdiction not to be self-executing, the City Council is hereby given power and authority to adopt appropriate legislation for the purpose of effectuating the objects hereof."

Section 432, therefore, perpetually excludes from public office or employment any person, or member of any organization, advocating the forcible overthrow of government. It does more. It declares that if the Section is held not to be "self-executing" by any Court, then the City Council is to adopt appropriate legislation "for the purpose of effectuating the objects hereof." Those "objects" are to exclude a class of persons from public employ. The Ordinance here openly stated that it is intended "to effectuate" the objects of the Charter provision. It is the intent of the Ordinance to "execute" the Charter provisions by effecting the perpetual exclusion of those who fall within the proscribed classes. How is this to be accomplished?

The Ordinance requires an oath [Sec. 1, R. 11] phrased in the language of the Charter provision from every person who holds or occupies a position in the service of the City [Sec. 2, R. 12] affirming that he has not in the past five years advocated, does not now, and will not in the future advocate the proscribed doctrines, and has not been in the past five years, and is not and will not be a member of an organization which so advocates.

The Ordinance also requires that the same persons execute an affidavit stating whether or not they are or ever were members of the Communist Party of the United States of America or of the Communist Political Association and if they are or were such members, the dates and periods in which they were such members.

As to the oath requirement, it is clear that it falls precisely within the form of enactment condemned in the *Cummings* and *Garland* cases. It deals with past activities, as well as present and future activities. The exclusion intended is perpetual. The Ordinance assumes that there are employees guilty of the offenses proscribed in the Charter. Otherwise, this Ordinance "to effectuate" the Charter would have no meaning. The Ordinance is aimed at past acts. It is intended to operate upon any employee who has in the past advocated or belonged to an organization which advocated the forcible overthrow of the government. It is intended to deprive such persons of their offices. Such deprivation is punishment. The only method of exculpation is by the expurgatory oath. For those who are unable to take the oath, there is no exculpation. To them the deprivation was intended to be, and is, absolute and perpetual.

The affidavit requirement in the Ordinance concerning past and present membership in the Communist Party and the Communist Political Association is affected with the same infirmities. There is a difference in form, but not in substance.

Obviously if the Ordinance is designed to effectuate Section 432 it means that if anyone were to admit membership in the proscribed organizations at any time in the past, such person could not continue to be employed. If the Ordinance be not so construed and if an admitted

Communist could continue in employ, then the whole Ordinance becomes bereft of all meaning. The City has asserted that failure to state whether an individual ever was a Communist establishes one's "treasonable" character and unfitness for public employment. Would such an admission of odious conduct make the person involved any more desirable than one who is presumed "treasonable" because he has failed to execute the affidavit? Surely the City cannot seriously so contend, particularly when it has admittedly already discharged two of the petitioners who did sign the force and violence section but did not sign the non-Communist section.

Moreover, an additional vice attends the affidavit section of the Ordinance. It must be emphasized that the entire Ordinance is intended to effectuate the purposes of the Charter provision and otherwise insure the loyalty of the employees. The Charter speaks only in generic terms of organizations which have advocated the forcible overthrow of government. The legislature here, in effectuating the purposes of the Charter has made a "determination" that the Communist Party and the Communist Political Association are organizations which have in the past and do now advocate the proscribed doctrines and that they have been and are disloyal. It is submitted that such a judicial determination can never be made by the legislative arm of government.

> "The Legislature, however, is without power to determine that a particular person or group has advanced the doctrine which violates the policy laid down in the statute. If the statute be interpreted to

include the implied finding here in question, as contended by defendants, it would mean that the Legislature had determined that a special group had violated the general policy of the statute. Such legislation would be clearly unconstitutional."

Communist Party v. Peek, 20 Cal. 2d 536, 549, 127 P. 2d 889.

That it is not within the province of a legislature to declare persons guilty or presumptively guilty of offenses has been settled by this Court.[7]

It is submitted, therefore, that the Ordinance here on its face, evinces a clear intent to inflict punishment by permanently depriving persons of their avocations. That dismissal follows upon failure to take the oath without the slightest semblance of hearing or trial is also clear from the statute. Since the Ordinance states in the preamble that it is effectuating the Charter provision, and since the oath and affidavit are the methods for executing Section 432 is clear that no one can be retained who fails to comply with the Ordinance. Moreover, Sections 2 and 4 [R. 12] of the Ordinance state that the oath and affidavit "must" be executed within 30 days after the effective date of the Ordinance. Section 8 of the Ordinance provides:

"It shall be the duty of each appointing power to require each officer or employee to execute and file an oath and affidavit as required hereby."

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[7] *McFarland v. American Sugar Refining Co.*, 241 U. S. 79; *Bailey v. Alabama*, 219 U. S. 219; *Manley v. Georgia*, 279 U. S. 1; *Western and Atl. R. R. Co. v. Henderson*, 279 U. S. 639; *Tot v. United States*, 319 U. S. 463.

Sections 9 to 23 of the Ordinance provide for investigations and determinations relative to the falsity or violation of oaths which have been filed.[8] There are no such provisions for those who have failed to execute the oath or affidavit. The only conclusion which can be drawn from an examination of the entire Ordinance is that those who do not comply are automatically dismissed.

As further bearing on the intent, operation and effect of the Ordinance we believe it appropriate and within the cognizance of this Court to observe how the Executive arm of the City Government interprets and construes this Ordinance.

> "The answer is signed by the Attorney General of the State; and if he were authorized to interpret the meaning of the other voice of the State heard in Art. No. 10, would seem to impart that the latter was a bill of pains and penalties disguised in general words."

Justice Holmes in *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, 85.

In its brief in opposition to the petition for writ of certiorari, the respondent, through the City Attorney asserted that,

> "No doubt the Superior Court assumed and this Court may assume in this connection, that the Communist Party of the United States of America is and has always been, and that the Communist Political

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[8] False oaths and affidavits, such as the ones involved herein, constitute perjury in California. Penal Code, Sections 118, 118a; *People v. Ziady*, 8 Cal. 2d 149, 64 P. 2d 425.

> Association during its existence was at all times, an organization * * * created and administered for the prime purpose of overthrowing the constitutional government of the United States * * *" (p. 15).

Here is an admitted "finding" of past and present unlawfulness by sheer fiat.

That the intent is to inflict punishment for past offenses is made perfectly plain by the legislature, speaking through its authorized representative. The Ordinance was enacted

> "To insure that none of their employees had been engaged within that recent period in felonious conduct forbidden by the Smith Act (United States Code, Title 18, Section 2385) and by the California Syndicalism and Sabotage Law—and the provisions of Section 432 of the Charter * * *". (P. 2.)

> "The relevancy of the declarations required to be made in the oath * * * is supported by the California Syndicalism and Sabotage Law * * * and by the California Subversive Organizations Registration Law—and by the provisions of Sections 2381-2386 of Title 18 of the United States Code" (p. 10).

Failure to take the Oath was construed as meaning:

> "I could not truthfully execute the affidavit required of me, because I am or have recently been a member of—and each of these organizations is a criminal conspiracy. Evidence of my membership consequently would lead to my prosecution under the Smith Act * * * the California Syndicalism and Sabotage Law. I could not truthfully take the oath, and * * * if I nevertheless had taken the oath I would have subjected myself to prosecution for perjury" (p. 21).

In the light of such construction, it can hardly be contended that the oath and affidavit were not intended to identify the class of persons upon whom the punishment of perpetual exclusion was to be visited.

Of the determination of guilt by the legislature and the intention to dismiss upon failure to take the oath, one need only note the following statement:

> "* * * it is still more absurd to contend, as the petitioners do in effect, that one has an enforcible right to occupy a position of public trust and at the same time a protected right or privilege to scheme, conspire and work for the forcible overthrow of the government" (p. 12).

And it is not unimportant to note in this connection that the petitioners here are in fact discharged, and this admittedly only because their "failure to comply with the provisions of Ordinance Number 94,004" [R. 6]. That the Ordinance means what it says is evidenced from the action taken by the respective appointing powers immediately after the effective date [R. 13]. The notices of discharge [R. 23] stated:

> "You are hereby notified that the Board of Public Works has discharged * * * for the following cause * * * Cause I. He failed to take and subscribe to the oath set forth in Section 1 of Ordinance No. 94,004 passed by the Council of the City of Los Angeles on October 21, 1948 as required by the provisions of the said ordinance. Cause II. He failed to execute an affidavit stating whether or not he was or ever had been a member of the Communist Party of the United States of America or of the Communist Political Association as required by—provisions of the said ordinance." [R. 23.]

By a single letter addressed to counsel [R. 25-26] for all 17 petitioners, the Civil Service Commission sustained the charges as made [R. 25].[9]

The Ordinance enacted by the Council of the City of Los Angeles inflicts punishment without judicial trial and by an entire substitution of inquisitorial procedures for the common-law accusatorial system. It is a bill of attainder and *ex post facto* law within the express prohibitions of the United States Constitution.

D. Conclusion—The Decisions of This Court in Dent, Hawker and Lovett

Dent v. West Virginia, 129 U. S. 114, emphasizes, and is not contrary to, the views heretofore expressed. The decision was rendered by Justice Field who noted that the West Virginia statute in operation and effect was entirely different from the statute involved in the *Cummings* and *Garland* case. Justice Field stated that neral qualifications appropriate to a calling and attainable by reasonable study or application are not objectionable because of their

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[9]That the Oath and Affidavit were considered inseparable is evidenced by the fact that all 17 were discharged at one time, although two had signed the oath but not the affidavit.

On the issue of separability or narrowing construction, there does not appear to be any manner in which the invalidity of the oath and affidavit can be cured. The requirements of the Ordinance do not operate only *in futuro*. In issue here are *past completed discharges*, effective January 7, 1949, and predicated upon a refusal to sign the Oath and Affidavit as it then existed and exists now—unqualified by any separation or construction. Both from the viewpoint of plain legislative intent and from the fact that it cannot be determined now whether petitioners would have signed an Oath and Affidavit different in form and content, it would appear, it is respectfully submitted, that this Court is in no position to rewrite the Ordinance. See *Stromberg v. California*, 283 U. S. 359, 368; *Williams v. North Carolina*, 317 U. S. 287, 292; *In re Bell*, 19 Cal. 2d 488, 500; *Yu Cong Eng v. Trinidad*, 271 U. S. 500.

stringency or difficulty. But if they have no relation to a calling, or are unattainable by such reasonable study and application, they operate to deprive one of his right to pursue a lawful vocation (p. 122).

The West Virginia statute presented nothing which indicated an intention of the legislature to deprive anyone of his rights (p. 123).

> "There is nothing of an arbitrary character in the provisions of the statute in question; it applies to all physicians, except those who may be called for a special case from another State; it imposes no conditions which cannot be readily met; and it is made enforceable in the mode usual in kindred matters, that is by regular proceedings adopted to the case" (p. 124).

There was no denial of a hearing judicial in character. No expurgatory oath was involved.

The *Cummings* and *Garland* cases were different, stated Justice Field.

> "A large portion of the people of Missouri were unable to take the oath, and as to them the court held that the requirements of its constitution amounted to a legislative deprivation of their rights" (p. 126).

> "The court held that the law in exacting the oath as to his past conduct as a condition of his continuing in the practice of his profession, imposed a penalty for a past act, and in that respect was subject to the same objection as that made to the clauses of the constitution of Missouri and was therefore invalid."

In sum, there were only general qualifications set forth in the statute which satisfied the due process requirements

so far as arbitrariness was concerned; there was no intent to punish or deprive anyone of his office, and the statute was enforcible "by regular proceedings adopted to the case."

Hawker v. New York, 170 U. S. 189, dealt with a statute which provided generally that any person after conviction of a felony who attempted to practice medicine would be guilty of a misdemeanor. The statute was held constitutional as applied to a person who had been convicted of a felony prior to its enactment.

The majority of this Court held, as in *Dent*, that a State had the undoubted right to prescribe general qualifications for physicians; that one of those qualifications could be good moral character; and if not arbitrarily done, the State could determine what shall be the evidence of that character (p. 195). Violation of the criminal law could be made a test of bad character; "and if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the State? The conviction is, as between the State and the defendant, an adjudication of the fact" (p. 196).

While the dissenting justices maintained that the statute did inflict additional punishment and determine bad character arbitrarily, there is not the slightest intimation from any of the Justices that a legislature could declare individuals, or easily identifiable classes of persons, morally unfit to practice medicine because of past violations without any judicial determination of that fact. The *Hawker* case presupposes some judicial hearing with "the question of violation to be determined according to the ordinary

rules of evidence." The Ordinance here deliberately excludes without any opportunity to hear or be heard according to the processes of law. The two situations are entirely and essentially different.

The Ordinance here does more violence to the constitutional prohibitions than the Congressional statute in *United States v. Lovett*, 328 U. S. 303. The latter statute identified three individuals by name. The Ordinance here just as effectively identifies the persons upon the Ordinance is intended to operate.

There may have been room in the *Lovett* case to argue that the statute on its face did not inflict the penalty of perpetual exclusion from office, though it cannot be denied that the intent was plain enough. That problem is not presented here. This Ordinance determines guilt and compels dismissal with all the trappings of judicial magistracy. The statement of this Court in the *Lovett* case is equally applicable here (p. 317):

> "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts. * * * And even the courts to which this important function was entrusted were commanded to stay their hands until and unless certain tested safeguards were observed. * * * When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder."

II.

The City of Los Angeles Was Without Constitutional Power to Require the Test Oath and Affidavit Set Forth in the Ordinance and Petitioners' Discharge for Failure to Execute the Said Oath and Affidavit Deprived Petitioners of Freedom of Speech, Press, Assembly, Association and the Right to Petition for Redress of Grievances Without Due Process of Law in Violation of the Fourteenth Amendment to the United States Constitution.

A. Introduction.

This Ordinance was enacted "to insure the loyalty of the officers and employees" of the City of Los Angeles [R. 11].

In broad aspect, there would appear to be only two methods by which a municipality can "insure" the loyalty of its employees, assuming that the word loyalty has any fixed content. The first is the voluntary method by which the municipality, through different and appropriate means, elicits the loyalty of its employees. The other method is the compulsory method. Here the means used may also vary, but the object and purpose is to compel loyalty, regardless of the will of the employee.

Generally, there are two methods of *compelling* the loyalty of government employees. The Government may require that all of its employees swear, as a condition of continued employment, that they are and will be loyal to the Government. The oath is promissory in character. Scruples with respect to taking the oath, if foregone, will enable the employee to continue in his employment. This may be described as the "alteration of loyalty" method. This compulsory method is familiar in history. The

Romans employed it with respect to all their civil functionaries.

> "When anyone was accused of Christianity, he was required as a means of testing the truth of the charge, to offer incense to the gods or to the statutes of deified Emperors. His compliance at once exonerated him. The objection of the Christians—they and the Jews were the only objectors—to the worship of the Emperors was, in the eyes of the Romans, one of the most sinister signs that their religion was dangerous. The purpose of this worship was to symbolize the unity and solidarity of an Empire which embraced so many people of different beliefs and different gods; its intention was political, to promote union and loyalty; and it is not surprising that those who denounced it should be suspected of a disloyal spirit."
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> Bury, J. B., a History of Freedom of Thought (1913), p. 43.

The second method which a Government may use to compel loyalty can be described as the "excision" method. Nothing is left to the will of the employee. The perfect symmetry of loyalty in the body politic is achieved by simply scraping off all protuberances deemed by the Government to be disloyal. Examples of such methods are familiar in contemporary history. One of the latest examples is the Ordinance here.

The position of the petitioners is: (1) a municipality is without authority under the United States Constitution to *compel* the *loyalty* of its employees or citizens; (2)

where the end result sought by a municipality is the loyalty of its employees, the means used to attain such result must be legitimate, that is, they must not punish, restrain, or abridge First Amendment liberties as embodied in the Fourteenth Amendment; (3) the security of the State is not "insured" by a compulsory test oath and since other appropriate means (legal and otherwise) are available to obtain "loyalty," the rights of employees of a municipality to exercise the freedoms guaranteed them by the Constitution are not overborne by the interest of the municipality to employ only loyal employees.

It is important, it is respectfully submitted, to delimit the issues involved herein. We are not dealing here with any compulsory oath required under any and all circumstances. We do not discuss oaths required of jurors, or of witnesses in a trial. We are not discussing the oaths affixed to an income tax return, nor the oaths of witnesses appearing before a legislative committee, nor the constitutional oath of office. The principles we discuss hereafter may, of course, have applicability beyond the confines of this case where they may be tested to the limits of their logic, but it is this Ordinance and the compulsory test oath therein contained which we here examine.

We do not conceive our arguments herein to be in terms of absolutes. It is true that petitioners deny the power of the City to compel a loyalty oath. This argument, however, proceeds from the basic assumption that the State does not have an unbridled and arbitrary power over the lives, liberties or properties of its citizens and em-

ployees.[10] On the same terms, the petitioners recognize that speech which injures other individuals, as in libel or slander, or speech which is not in the area of advocacy but merged with unlawful conduct may come within the compass of the law. (See, *Thornhill v. Alabama*, 310 U. S. 88; *Chaplinsky v. New Hampshire*, 315 U. S. 568; *Reynolds v. United States*, 98 U. S. 145.) But speech which constitutes the advocacy, teaching or advising of

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[10]That a State does not have unlimited "police powers" with respect to its citizens, or any class of its citizens, is settled. *Shelley v. Kramer*, 334 U. S. 1; *Ex parte Virginia*, 100 U. S. 339; *Moore v. Dempsey*, 261 U. S. 86; *Powell v. Alabama*, 287 U. S. 45; *Mooney v. Holohan*, 294 U. S. 103; *Chambers v. Florida*, 309 U. S. 227; *Cantwell v. Connecticut*, 310 U. S. 296; *American Federation of Labor v. Swing*, 312 U. S. 321; *Pennekamp v. Florida*, 328 U. S. 331; *Yick Wo v. Hopkins*, 118 U. S. 356; *Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 102; *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337.

That the right to pursue an avocation or public calling is a fundamental right of all citizens and that the exercise of this right cannot be clogged with conditions that are repugnant to their constitutional liberties, is also settled. *Cummings v. Missouri*, 4 Wall. (U. S.) 277; *Ex parte Garland*, 4 Wall. (U. S.) 333; *Meyer v. Nebraska*, 262 U. S. 390; *Pierce v. Society of Sisters*, 268 U. S. 510; *United Public Workers v. Mitchell*, 330 U. S. 75. A citizen who serves the state in public office or employment does not impliedly surrender his constitutional rights. *Board of Education v. Haddon Farms*, 128 N. J. L. 306, 25 A. 2d 905; *Spayd v. Ringling Rock Lodge*, 270 Pa. 67, 113 Atl. 70. Under a general statute prescribing standards of competence and suitability, a citizen may not claim any legal right to be selected in any particular instance for any particular job. If while occupying an office he is shown to have accepted a bribe and remained silent when the evidence was presented, he may not claim that his right of privacy has been invaded. In such a case, proof of bribery, undenied, is the cause of the dismissal. *Cf., McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N. E. 517. But see the opinion of Justice Holmes in *United States ex rel. Milwaukee v. Burleson*, 255 U. S. 407, 437. It does not follow, however, that a citizen may be arbitrarily denied employment or disqualified from office by special legislation without hearing or proof of unlawful conduct. *Cummings v. Missouri*, 4 Wall. (U. S.) 277.

ideas, of opinions or of beliefs are wholly free from governmental intrusion. "Where the First Amendment applies, it is a denial of *all* governmental power in our federal system." (*Marsh v. Alabama,* 326 U. S. 501, 511.) See also, opinion of Justice Rutledge in *Musser v. Utah,* 333 U. S. 95, 98.

Nor, as the petitioners view it, are the issues here affected by decisions which deal with claims that a statute general in operation has prescribed standards unlawful or unconstitutional, or that a valid statute has been unlawfully or unconstitutionally construed and applied. In the process of a hearing or appropriate administrative inquiry, procedural or substantive due process may be denied, largely determined by the facts and circumstances of the particular case. That is not the situation here. This Ordinance prescribes no general standards of education, experience, knowledge and ability as qualifications for office. As a matter of fact those standards have already been prescribed. See Charter, City of Los Angeles, Section 100, *Cf.* Charter, Sections 103, 112. The petitioners here have never been charged with misconduct in office, nor has evidence of any misconduct ever been presented at any hearing or trial. No such claim of misconduct has ever been made by the municipality [R. 6]. This legislation is special and specific, intended solely to compel loyalty by means of a test oath and affidavit and to perpetually exclude those who cannot or will not sign.

The petitioners' claims arise out of the failure to take the particular oath set forth in this Ordinance. The form and content of this oath, the intent, operation and effect of this statute, is what is involved here.

B. The Decisions of This Court in the Gobitis and Barnette Cases.

In *Minnersville School District v. Gobitis*, 310 U. S. 586, this Court had before it the validity of a regulation of a schoolboard requiring all teachers and students to salute the national flag and make the following pledge:

> "I pledge allegiance to my flag, and to the Republic for which it stands; one nation indivisible, with liberty and justice for all."

Objection to the pledge was based on the grounds of religious scruples which forbid such gestures of respect for the flag.

In sustaining the school regulation as a valid exercise of the police power, Justice Frankfurter writing for a majority of this Court, held that the religious liberty which the Constitution protects has never excluded legislation of general scope "not directed against doctrinal loyalties of particular sects" (p. 594). Assuming that power existed to compel the affirmation required in the pledge, Justice Frankfurter wrote that national unity was the basis of national security, and that the compulsory flag salute was an appropriate means which a state could employ to attain such a permissible end.

The dissenting opinion of Chief Justice Stone, emphasized that an initial question of power was involved in the case. The law did "more than suppress freedom of speech and more than prohibit the free exercise of religion". (p. 601). "If these guaranties are to have any meaning they must, I think, be deemed to withhold from the state *any* authority to *compel* belief or the expression of it where that expression violates religious convictions, *whatever may be the legislative view of the desirability of*

such compulsion" (p. 605) (emphasis supplied). But even if it be argued that there is room for legislative judgment, stated Justice Stone, still that judgment is open to judicial examination and where other means are available to elicit respect for the flag without infringing upon liberties guaranteed by the Constitution, the regulation cannot stand.

Some three years later, the same issue was before this Court, in *West Virginia State Board of Education v. Barnette,* 319 U. S. 624. The statute compelling the pledge and flag salute was held unconstitutional. Proceeding to the heart of the matter, Justice Jackson stated:

> "The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power." (P. 636.)

What was the content of the idea which was sought to be compelled?

> "Here it is the State that employs a flag as a symbol of *adherence to government as presently organized.* It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objections to this form of communication *when coerced* is an old one well known to the framers of the Bill of Rights" (P. 633.) (Emphasis supplied.)

Was there power under our constitutional system "to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one?" (P. 634.) Was there power, in short, to *coerce*

adherence to government as presently organized? The answer was as follows:

(1) Because a government is without constitutional power to *compel* loyalty does not weaken or destroy the security of the government. "It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." (P. 637.)

(2) However much deference may be due to the delicate balance of federal-state relationship in our American system, no power can be exerted by any political subdivision of government which contravenes the letter or spirit of the Constitution. "* * * none who acts under color of law is beyond reach of the Constitution." (P. 638.)

(3) This Court acts not by authority of its competence but by force of its commissions. While it is committed to the legislatures as well as the courts to guard cherished liberties, certain subjects by the Constitution are withdrawn from the vicissitudes of political controversy, are placed beyond the reach of majorities and officials, and are established as *legal principles* to be applied by the courts.

(4) Finally, and most important, if national unity is a legitimate end, is the compulsion to swear an oath of adherence to government as presently organized an "appropriate means" for its attainment? It is not, and it is not because the Constitution says it is not. "Compulsory unification of opinion achieves only the unanimity of the graveyard. * * * the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.

* * * We set up government by consent of the governed and the Bill of Rights denies those in power any legal opportunity to coerce that consent. * * * But freedom to differ is not limited to things that do not matter much. * * * The test of its substance is the right to differ as to things that *touch the heart of the existing order.* * * * no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, *or force citizens to confess by word or act their faith therein*" (pp. 641, 642). (Emphasis supplied.)

The conclusion of the majority of this Court was that "the action of the local authorities in compelling the flag salute and pledge *transcends constitutional limitations* on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from *all* official control" (p. 642). (Emphasis supplied.)

In adhering to his former views expressed in the *Gobitis* case, Justice Frankfurter made one affirmation which has bearing on the issues here (p. 663):

"The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs. . . . Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution."

In maintaining that a state had the power to compel the affirmation of a belief or opinion, and that the exercise of such power did not constitute an infringement of liberties guaranteed by the Fourteenth Amendment, we believe, it is respectfully submitted, that the learned Justice was in error. The absolute prohibition of the First Amendment is based upon the experience of history that there are more ways than one of "suppressing heretical beliefs." Death is not the only way, nor even the surest. There are other ways.[11] Even the threat of denial of a public education to young children may suppress belief, or curb it. The Constitution was designed "to avoid" suppression by avoiding its beginnings. It is important to note, however, that there was no disagreement between the members of this Court on the invalidity of test oaths. Test oaths are intended to suppress beliefs, and such instrumentalities are incompatible with the Constitution.

It is submitted that the foregoing discussion applies with equal validity here. What is the avowed purpose of the Oath contained in this Ordinance? It is to "insure the loyalty" of officers and employees of the municipality.[12] How is this loyalty to be "insured?" It is to be assured by *compelling* each employee, upon pain of exclusion from his chosen avocation, to swear that he has never in the past, does not now, and never will personally or in assembly with others, ever express the opinion, or advise, or teach the overthrow by force or violence or "other unlawful

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[11] ". . . man might as well be imprisoned, as excluded from the means of earning their bread." Mill, J. S., On Liberty (1885), p. 60.

[12] 6,000,000 citizens, excluding military personnel, are today in public employ. Mosher, Kingsley and Stahl, Public Personnel Administration (1950), p. 43.

means," of the Government of the United States or of the State of California. If one reads the preamble and the requirements of the Oath contained in the Ordinance together it is clear that its avowed intention is to compel perpetual loyalty to government by extracting a sworn oath that the individual will never express the concept of revolutionary overthrow of the government.[13] No matter how tyrannical the Government may become, even if it should trample upon the Constitution and deny all lawful

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[13]In the context of this case we do not discuss the political, social or philosophical merits or demerits of this idea, or the various meanings which different groups in society may give to it. It is sufficient that it is an idea, an opinion or concept. As such, it has its place in the marketplace of ideas and is entitled to respect whether we agree with it or not. "The worst offence of this kind which can be committed by a polemic, is to stigmatize those who hold the contrary opinion as bad and immoral men." Mill, J. S., On Liberty (1885), p. 97. As to the social utility of such discussion which touches "the heart of the existing order," see the same author, pp. 95-96. That the idea is deeply imbedded in American tradition is attested by the catalogue of statements set forth in the footnote (12) in the opinion of Justice Jackson in *American Communication Association v. Douds*, 339 U. S. 382, 440. That the idea embodies more than tradition and is fixed in our constitutional tenets is reflected in Judge Rutledge's reference to "the inalienable right of revolution which our fathers exercised in the Declaration of Independence." A Declaration of Legal Faith (1947). See also, Commager, H. S., Documents of American History (1940), 2nd Ed.; Parrington, V. L., Main Currents in American Thought (1927), Vol. 1.

If the advocacy of an idea is suppressed, it is difficult to perceive how belief in the idea is not "suppressed" as well. Thought without expression is valueless. In time it will either wither away or linger on until later and freer generations permit it to be heard. As Justice Holmes stated: ". . . the use of the mails is almost as much a part of free speech as the right to use our tongues." *U. S. ex rel. Milwaukee J. D. Pub. Co. v. Burleson*, 255 U. S. 407, 437.

Even in the realm of conduct, we do not conceive it within the power of a state to "insure" loyalty by extracting a forced oath, upon pain or dismissal, confessing the commission of criminal offenses. See, *Chambers v. Florida*, 309 U. S. 227; *Watts v. Indiana*, 338 U. S. 49; *In re Oliver*, 333 U. S. 257.

opportunity to amend it, and refuse citizens the exercise of the franchise, even then, the citizen in public employ is required to hold his tongue and be "loyal" to the Government. As in the *Barnette* case, he has sworn "adherence to government as presently organized."

It must be emphasized, however, that the Oath here is far more stringent than the one involved in the flag salute cases. In the latter, the pledge which was required included only an affirmation of allegiance to the flag and the Republic for which it stands. If religious or moral scruples could be overcome, the pledge could be taken and the advantages of a public school education retained. While compulsion by the state upon individuals to forego beliefs, or to express beliefs not believed, was held unlawful by this Court, it should be noted that the difference between majority and minority in the *Barnette* case lay principally in the view, on the one hand, that authority was without *any* power to *compel* expression of beliefs as a means of obtaining loyalty, and on the other hand, in the view that authority *might* condition the use of its schools upon compulsory affirmation of loyalty, provided that the individuals were left free, in and out of the schools, to disavow the beliefs they had been forced to express. There was not, in Justice Frankfurter's view, "the slightest curbs upon such free expression."

> *West Virginia State Board of Education v. Barnette, supra,* p. 664.

Under this Ordinance, however, there is more than a "slight curb" on free expression. Here, an individual can lose his livelihood, and suffer stigma and disgrace, if he cannot swear that in the last thirty years (since force and violence and Communist Party are equated) he has not for even a day expressed the view that the government

should be forcibly overthrown. And since the situations are rare when this concept is ever punished in the abstract, but is often interpreted by officialdom as including any advocacy of fundamental societal changes [see Section 9 of the Ordinance, R. 13], the individual is effectively stripped of his office and livelihood, even if he were to swear that his mind would forever be like a sheet of blank paper.

Nor should it be overlooked that the first portion of the Oath [R. 11] requires the individual to support and defend the Constitution, while in the second portion of the Oath he is required to disavow a belief which the Constitution protects. He is required to support a Government perpetually, no matter how autocratic it may become, despite the fact that the Constitution which he has sworn to uphold guarantees to each state a Republican form of government.

The petitioners submit the municipality here was without constitutional power to exact such test oath. They assert further that even if the power to compel loyalty existed, the instrumentality of a test oath is not a legitimate means to obtain such result. Both of these propositions are amply supported by historical and legal precedents, to which the discussion hereafter is devoted.

C. Compulsory Loyalty Oaths Have No Place in the American Constitutional System.

"A long time was needed to arrive at the conclusion that the coercion of opinion is a mistake, and only a part of the world is yet convinced. That conclusion, so far as I can judge, is the most important ever reached by men."

Bury, J. B., A History of Freedom of Thought (1913).

A history of the struggles for the freedom of reason against the coercion of Authority can only be briefly sketched. It is safe to say that from the sixteenth century to the American and French Revolutions nearly all important historical events bore in some way on the struggle against coercion. Such a history would include, for example, the struggle against the censorship of the press (Milton, Areopegetica, Works, IV); the rise and fall of Star Chamber; the seditious libel prosecutions against Wilkes and Junius; the defense of Stockdale by Thomas Erskine; the persecutions in eighteenth century England of the London Corresponding Society, Orange Societies and Anti-Corn Law Societies; the sedition trial of Thomas Muir for advocating parliamentary reforms, the religious persecutions which plagued England and Europe for centuries; the martyrdom of Sir Thomas More who would not execute an oath of loyalty to the King by renouncing the head of the Catholic Church; the test oaths[14] and prosecutions on oaths *ex officio*—in sum, the wide sweep of important historical events which affected the hearts and minds of those who migrated to the New World.

One reference from the pages of history may be cited. In defending Paine, under an indictment for publication of the Rights of Man, Erskine stated:

> "If, in the march of the human mind, no man could have gone before the establishments of the time he lived in, how could our establishment, by reiterated changes, have become what it is? If no man could

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[14] Some of the history and content of these test oaths are contained in the footnotes (3, 4, 7, 8) of the dissenting opinion of Justice Black in *American Communications Association v. Douds*, 339 U. S. 382, 447, 451. See also, Encyclopedia Britannica, "Inquisition"; "Test Acts"; and the statutes recited in Point I of the Argument herein.

have awakened the public mind to errors and abuses in our Government, how could it have passed on from stage to stage, through reformation and revolution, so as to have arrived from barbarism to such a pitch of happiness and perfection, that the Attorney-general considers it as profanation to touch it further, or to look for any further amendment?

In this manner power has reasoned in every age; government in *its own estimation*, has been at all times a system of perfection; but a free press has examined and detected its errors, and the people have from time to time reformed them. This freedom has alone made our Government what it is; this freedom alone can preserve it; and therefore, under the banners of that fredom, today I stand up to defend Thomas Paine."

Paine, Life and Writings (N. Y. 1908), Vol. I, Wheeler ed. p. 100.

The struggle in America for what James Madison described as "free and responsible government" found its pivotal point in the effort to emancipate the opinions of men from governmental coercion. Roger Williams and Ann Hutchinson are but symbols of that struggle. (Ernst, Roger Williams, New England Firebrand (N. Y. 1932); Adams, Emancipation of Massachusetts (N. Y. 1919).) For even in the colonial days, marked as they were with religious and secular dogmatism, the view that "neither the political state nor the official hierarchy can justly coerce the individual conscience" permeated in constantly increasing strength the minds of the common people. (Parrington, V. L., Main Currents in American Thought (N. Y. 1927), Vol. 1, p. 12.) In New England, the struggle centered around "the right of the individual to determine his own belief, uncoerced by external authority" (*id.* p. 52). Samuel Adams well knew, states Parrington, that

"America was founded in rebellion, . . . and it should continue in rebellion till every false loyalty was cast off and concern for the common well-being accepted as the single loyalty worthy of respect" (p. 234). As the Revolution neared, Paine was advising that "There can be no trusteeship superior to the sovereign people—no constitution beyond their rightful power to alter or destroy" (*id.* p. 325). Madison wrote, ". . . the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men." Memorial and Remonstrance Against Religious Assessments, 11 Writings of Madison, p. 183. Jefferson held that "the opinions of men are not the object of civil government nor under its jurisdiction." Works, Mem. Ed. Vol. 2, p. 300. In the Virginia Statute of Religious Liberty, it was stated:

> "Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations . . . are a departure from the plan of the Holy author . . ., who being Lord both of body and mind, yet chose not to propagate it by coercions on either. . . ."[15]
>
> Commager, H. S., Documents of American History (1940), p. 125.

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[15]The history of freedom of thought is written largely in the pages of volumes on religious freedom, for until modern times, separation of church and State was not familiar. That history demonstrates that freedom of opinion and freedom of religion are cognate rights. *De Jonge v. Oregon*, 299 U. S. 353. For other background of the struggle against the coercion of opinion by the State, see Kentucky Resolutions of 1798 and 1799, 4 Elliot's Debates 540; the history of the "Committees of Correspondence" in History of the State of New York (N. Y. 1933), Fleck Ed., Vol. III; the defense of the "democratic societies" Life of Madison (Bost. 1859), Vol. 3, pp. 464-469; Am. Cong. 3rd Cong: 1st and 2nd Sess. 1793-1795, pp. 934-935; the story of the abolitionists, Birney, William, James J. Birney and His Times (N. Y. 1890); Goodell, Slavery and Anti-Slavery (N. Y. 1852). See also, *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 227, 228.

It was from this background that the American conception of political freedom was born. It was understood that the people are the ultimate source of all political power; that the form of government is republican; and that the powers of government are defined and limited in fundamental constitutional laws. As Madison stated: "The authority of constitutions over governments, and of the sovereignty of the people over constitutions, are truths which are at all times necessary to be kept in mind; and at no time like the present." Report on the Virginia Resolutions, 4 Elliot's Debates, p. 550. He stated further: "If we advert to the nature of Republican Government in general, we shall find that the censorial power is in the people over the government and not in the government over the people." Ann. Cong., 3rd Cong. 1st and 2d Sess., p. 934. The fundamental nature of this principle has been affirmed by this Court. See opinion of Justice Jackson in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 641.

In order to devise a form of government in which political power would cease to be arbitrary, the founding fathers placed above and beyond the reach of governmental action, those "sacred and imprescriptible rights which are enumerated in the Bill of Rights. They include, among others, freedom of religion, freedom of speech and the press, freedom of assembly and the right to petition the government. In setting forth these civil liberties of the citizen, the constitutions define a sphere of action which is entirely withdrawn from governmental control." Becker,

Carl, Political Freedom in Safeguarding Civil Liberty Today (N. Y., 1945), p. 16.

That the framers of the Constitution believed that freedom of speech was a natural and inalienable birthright of every individual cannot be doubted. But it is also clear, that they recognized greater social and political values in the unrestricted expression of opinion than those which were simply humanitarian. Imbued with the philosophy of Milton, Locke and Montesquieu, they recognized that not only the individual, but all of society, had a stake in freedom of the mind. They recognized that to advance knowledge and to correct errors, unrestricted freedom of opinion was required. The history of civilization, from Greece through the dark ages, indicated that a fundamental condition of social progress was perfect liberty of thought and expression.

> Bury, J. B., a History of Freedom of Thought (1913).

Moreover, the political value of an uncoerced citizenry was considered basic if the form of government created in 1789 was to survive. There could be no thought of "government by the consent of the governed" if that cosnent was not freely arrived at through the deliberative processes in society completely free from governmental intrusion. The security of the Republic (to which the members of the Council of the City of Los Angeles have pledged allegiance) rested upon that fundamental postulate. This thesis has been repeated many times by this Court:

> "The maintenance of the opportunity for free political discussion to the end that government may

be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

Stromberg v. California, 283 U. S. 359, 369.

The cases are collected in the footnote (4) of the opinion in *United States v. Carolene Products Co.*, 304 U. S. 144, 151. It is in this sense that Justice Cardozo viewed freedom of thought and opinion as "the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U. S. 319, 327.

It would appear, therefore, it is respectfully submitted, in the light of the foregoing, that there is no place in our constitutional system for any attempt by Government to *compel* citizens, upon pain of dismissal from their chosen pursuits, to express their opinions or beliefs, peaceful or revolutionary. It subverts the foundations upon which Government rests to compel loyalty and adherence by suppressing the beliefs and opinions of citizens that Government should be changed, whether those beliefs and opinion be true or false, agreeable or disagreeable. Compulsory loyalty laws are the hallmark of a despotism which was overthrown by revolution in 1776. That revolution was not successfully completed until the Constitution adopted by the people erected a fixed barrier against the return of ancient evils.

D. In the Light of the Liberties Guaranteed by the Fourteenth Amendment, the Compulsory Loyalty Oath Is an Inappropriate Means to Attain the Loyalty of Citizens in the Public Employ.

Heretofore we have discussed the lack of power in the municipality under the Constitution to exact the oath and affidavit set forth in the Ordinance.[16] The following is intended to demonstrate that even if the inculcation of loyalty of citizens in government employ is a permissible end—that is, that they shall adhere perpetually to the government as presently organized without revolutionary change—the instrumentality of the compulsory test oath is not a lawful means for obtaining such a result in the light of the indispensable freedoms secured by the Fourteenth Amendment. (*Thomas v. Collins*, 323 U. S. 516, 530.) Whatever deference may be due to federal-state relationship or to legislative judgment, those considerations are overborne in this case, it is respectfully submitted, by the express limitations of the Constitution and the tradition which the Constitution embodies. (*West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 639.)

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[16]As this brief was written, a decision was rendered by the California District Court of Appeal, Third Appellate District (*Tolman, et al. v. Underhill, et al.*, April 6, 1951, Civ. No. 7946), where an affirmation required of all members of the faculty of the University of California as a condition of employment that they are not members of the Communist Party "or any other organization" which advocates forcible overthrow of the government was held invalid. The Court construed the provisions for oaths of office contained in the California Constitution as intending "at least, that no one could be subjected, as a condition to holding office, to any test of political or religious belief other than his pledge to support the Constitutions of this State and of the United States, and that the exacting of any other test of loyalty would be antithetical to our fundamental concept of freedom." Los Angeles City Charter, Section 13, contains an oath of office requirement similar to that found in Article XX of the State Constitution.

There are many citizens who share the view that compulsory loyalty oaths—with the precise verbiage contained herein—are unnecessary, harmful, useless, and unlawful. A recent proposal to enact a similar oath for members of the Bar led to the issuance of a statement in opposition by a group of distinguished lawyers[17] which read in part:

> "The requirement of this new oath, moreover, will not in our judgment reveal the disloyal in our midst, whoever they may be . . . The existing means of discovering and punishing illegal or professionally improper conduct by presenting specific charges and supporting evidence are ample, in our belief, to meet any danger to our government or disgrace to our profession . . . We, therefore, oppose this method of intended detection . . . as unfounded in its implication of widespread disloyalty and illegal acts on the part of lawyers generally, and as unproductive of the hoped-for result."

The Committee on Law Reform of the Association of the Bar of the City of New York, in a formal report, also opposed the proposal. They found that safeguards already in existence were adequate to deal with any lack of loyalty or integrity; that the independence of the Bar would be seriously infringed and that grave constitutional questions were involved in the exaction of such an oath. "A lawyer who has already sworn to support the Constitution might conscientiously refuse to subscribe to an oath which may violate that same Constitution."

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[17] They included, among others, Owen J. Roberts, John W. Davis, Grenville Clark, C. C. Burlingham, John Lord O'Brian and Bethuel M. Webster. The statement appeared in the public press on December 17, 1950.

Zechariah Chafee, writing in the Harvard Law School Record (1950), stated:

> "A main effect of loyalty oaths for teachers, in Massachusetts and the University of California, was to throw out of the profession a few persons of recognized loyalty after years of devoted service."

Quoting the statement of a dean of the California university, Professor Chafee continued:

> "No conceivable damage to the University at the hands of the hypothetical Communists among us could have equalled the damage resulting from the unrest, ill-will, and suspicion engendered by this series of events."

In the field of scientific research, similar views prevail. Gelhorn, Walter, *Security, Loyalty and Science* (N. Y., 1950). The same general view is reflected in Barth, Alan, *The Loyalty of Free Men* (N. Y., 1951). "The only genuine loyalty is the loyalty of free men" (*id.*, p. 4). See also, O'Brian, John Lord, *Loyalty Tests and Guilt by Association*, 61 Harvard L. Rev. 592-661 (1948); Lerner, Max, Freedom; *Image and Reality in Safeguarding Civil Liberty Today* (N. Y., 1945), pp. 35-57. The same views may be found in Public Papers, Alfred E. Smith, 1923, p. 292; Public Papers, Herbert H. Lehman, 1938, p. 120; Chafee, Z., *Freedom of Speech* (1941). The opinions of Chief Justice Hughes in *Stromberg v. California*, 283 U. S. 359, and *DeJonge v. Oregon*, 299 U. S. 353, which reflect a lifetime philosophy (see *Memorial of the Special Committee*, 5 N. Y. Legis. Doc. No. 30, 143d Sess, 4, 1920), also support these views.

The inherent contradictions contained in the instant oath and affidavit are patent. In the first place, if as is argued

by respondent, failure to sign the oath is conclusive on the issue of disloyalty, why would not the same result follow if one failed to sign an oath which only required support for the Constitution? If such oath were not signed, according to the position of respondent, the individual would be automatically dismissed. If it were signed, and the appointing officer was in "doubt" as to whether the individual "swore falsely" or "has violated" the oath [Sec. 9, R. 13], he could "investigate and determine" the facts. Presumably, advocacy of force and violence and membership in the Communist Party are deemed by the City inconsistent with support for the Constitution.[18] It would therefore, follow that the employee would be dismissed. In either case, following the respondent's reasoning, the added oath would appear to be surplusage.

Further, as has been pointed out, compulsory loyalty oaths such as the ones involved here cannot possibly "insure" the loyalty of its employees. It cannot weed out the truly disloyal for on that very premise they would be the first to sign. It will in most cases exclude only those whose consciences as men and citizens will not permit them to sign such an oath. Unless one is prepared to equate noncomformity with disloyalty to government, the only result will be to exclude some of the worthiest citizens from their chosen avocations. See, Commager, H. S.,

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[18]The provisions of the Ordinance are sufficiently broad to permit the most arbitrary and discriminatory application of its provisions. Section 9 of the Ordinance [R. 13] provides that whenever an appointing authority "is in doubt" as to whether an oath has been falsely sworn or violated, he must "investigate and determine the facts." An alternate procedure [Sections 10-23, R. 13-18] may be invoked by the officials, but not by the employees. The existence of such provisions results in a continuous and pervasive restraint on all freedom of discussion. *Thornhill v. Alabama*, 310 U. S. 88.

Who Is Loyal to America? in Harper's Magazine, September, 1947; Curti, Merle, *The Roots of American Loyalty* (N. Y., 1946).

Nor can the oath "insure" the loyalty of those who remain. Compulsion, in itself, as the long history of civilization reveals, is never a means of inculcating loyalty. Unless beliefs, opinions and ideas are freely arrived at and freely expressed, they convey nothing but the prejudices of an individual who is not prepared to defend them on any rational basis. A state which possesses servants whose independence and judgment are gone, is an autocracy, not a democracy. The only loyalty which has any meaning is the loyalty which is freely given.

The loyalty of citizens in the public employ can be obtained in other ways than by compulsion. It is an affront to all citizens to think otherwise. There are sufficient democratic means at hand to weed out the real traitor and the real fakir. There is no arm of government today which does not have the power, within the limits of the Constitution, by investigation, accusation and hearing under proper standards, to rid itself of the unfit and incompetent. For those citizens who serve their government, loyalty can be elicited by positive considerations of education, training, conditions of employment, personnel administration, safety, health, welfare and all the related factors which lead civil servants to identify themselves with the goals of their work and their government. This is the only way to "insure" loyalty. Compulsion gives no such assurance, if indeed, it does not lead to the opposite result.

> "The worth of a State, in the long run, is the worth of the individuals composing it; and a State which postpones the interests of *their mental* expansion and elevation, to a little more of administrative

skill, or that semblance of it which practice gives, in the details of business; a State which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes, will find that with small men no great thing can really be accomplished; and that the perfection of machinery to which it has sacrificed everything, will in the end avail it nothing, for want of the vital power which, in order that the machine might work more smoothly, it has preferred to banish."

Mill, J. S., *On Liberty* (1885), p. 204.

Conclusion.

The judgment of the court below should be reversed.

Respectfully submitted,

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Counsel for Petitioners.

CHARLES J. KATZ,
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Of Counsel.

Service of the within and receipt of a copy thereof is hereby admitted this _____ day of April, A. D. 1951.

_____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 453.

RAY H. GARNER, HARRY BECKERMAN, AIDA BELDNER, JOHN B. BROWN, CARRIE L. DICK, MARY E. GRUNEWALD, EUGENE HALLETT, MARGARET B. HASKELL, EDWARD HAVENS, CORNELIUS LAWRENCE, VERA MANN, OLA ROSS PACIFICO, DANA PLATT, EUGENE REED, FRANCES SCHWARTZ, WILLARD SMART, FRANK TORREANO,

Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; CLARENCE J. DERRICK, JOSEPH O. DONOVAN, LOUIS M. DREVES, FRANK GILLELEN, EDWARD L. TAYLOR, and MILTON OFFNER, as Members of the Board of Public Works of the City of Los Angeles; BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; SAMSON A. LINDAUER, JUSTIN W. GILLETTE, CHARLES E. ARNN, RANSOM M. CALLICOTT, and MRS. IDA S. LAZARD, as Members of the Board of Civil Service Commissioners of the City of Los Angeles; DAN O. HOYE, City Controller of the City of Los Angeles; THE CITY OF LOS ANGELES, a Municipal Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION.

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SUBJECT INDEX

PAGE

Statement of the case 2

Issues presented in state court 5

Issues presented on certiorari 6

Opinions below 6

Jurisdiction 7

Statutes involved 10

Questions presented 11

Summary of argument 11

I.

The decision below is clearly correct 13

A. Basis of judgment 13

B. No substantial federal question involved 16

1. The people of a city may require that their servants have been loyal to the constitutional government of the United States and the state during the five-year past period 18

2. Such a requirement is one of qualification merely 21

II.

There is no conflict between the judgment below and any decision of this court 23

Conclusion 25

INDEX TO APPENDICES

PAGE

Appendix "A." Section 80 of the Charter of the City of Los Angeles (Statutes of California, 1925, page 1058)..... 1

Appendix "B." Section 112(a) of the Charter of the City of Los Angeles (Statutes of California, 1945, page 3102)..... 2

Appendix "C." Chapter 8 to Division 4, Title 1, of the Government Code 4

Appendix "D." Act 8428, California Syndicalism and Sabotage Law (Statutes of California, 1919, page 281)..... 9

Appendix "E." Pertinent Sections of Title 5 of the Corporations Code of the State of California..... 11

TABLE OF AUTHORITIES CITED.

CASES	PAGE
American Communications Ass'n v. Douds, 339 U. S. 382, 94 L. Ed. 925	17, 19, 23, 24
Bandini Petroleum Co. v. Superior Court, 284 U. S. 8, 76 L. Ed. 136	14
Barsky v. United States, 167 F. 2d 241; cert. den. 334 U. S. 843, 92 L. Ed. 1767	14, 17
Blair v. Ridgely, 41 Mo. 63	22
Board of Education v. Jewett, 21 Cal. App. 2d 64, 68 P. 2d 404	16
Boyd v. Pendegast, 57 Cal. App. 504, 207 Pac. 713	4
Brown v. Board of Police Commissioners, 2 Cal. App. 2d 245, 37 P. 2d 737	4
Brown v. Sch. Dist. of City of Bethlehem, 347 Pa. 418, 32 A. 2d 565; cert. den., 320 U. S. 782, 88 L. Ed. 469	9
Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648	18
Cantrell v. Board of Supervisors, 87 Cal. App. 2d 471, 197 P. 2d 218	13
Carter v. Forrestal, 175 F. 2d 364	4
Citizens Savings Bank v. Owensboro, 173 U. S. 636, 43 L. Ed. 840	16
City of Jackson v. McLeod, 199 Miss. 676, 24 So. 2d 319; cert. den., 328 U. S. 863, 90 L. Ed. 1633	9
Cohen v. Wright, 22 Cal. 293	21
Crampton v. O'Mara, 193 Ind. 551, 139 N. E. 360; dismissed, 267 U. S. 575, 69 L. Ed. 795	22
Cummings v. Missouri, 4 Wall. 277, 18 L. Ed. 356	18, 23, 24
Eberlin v. United States, 257 U. S. 82, 66 L. Ed. 140	4
Friedman v. Schwellenbach, 159 F. 2d 22; aff'mg 65 Fed. Supp. 254; cert. den. 330 U. S. 838, 91 L. Ed. 1285	16
Garland, Ex parte, 4 Wall. 333, 18 L. Ed. 366	18, 23, 24
Gitlow v. New York, 268 U. S. 652, 69 L. Ed. 1138	17

PAGE

Hamilton v. University of California, 293 U. S. 245, 79 L. Ed. 343 17
Hawker v. People of the State of New York, 170 U. S. 189, 42 L. Ed. 1002 23
Heim v. McCall, 239 U. S. 175, 60 L. Ed. 206 8
Henneford v. Silas Mason Co., 300 U. S. 577, 81 L. Ed. 814 14
Horosko v. Sch. Dist. of Mt. Pleasant, 335 Pa. 369, 6 A. 2d 866; cert. den., 308 U. S. 553, 84 L. Ed. 465 8
Howard v. Howard, 87 Cal. App. 20, 261 Pac. 714 7
Hunter, Ex parte, 2 W. Va. 122 21
Joyce v. Board of Education of City of Chicago, 325 Ill. 543, 60 N. E. 2d 431; cert. den., 327 U. S. 786, 90 L. Ed. 1013 9
Keokuk and H. Bridge Co. v. Illinois, 175 U. S. 626, 44 L. Ed. 299 16
Koral v. Board of Education, 94 N. Y. S. 2d 378 17
Kotch v. River Port Pilot Comm'rs, 330 U. S. 552, 91 L. Ed. 1093 7
L'Hommedieu v. Board of Regents, 276 App. Div. 494, 95 N. Y. S. 2d 443 ..... 16, 17, 18
Lindell Co. v. Board of Permit Appeals of San Francisco, 23 Cal. 2d 303, 144 P. 2d 4 ..... 13, 15
Ludolph v. Board of Police Commissioners, 30 Cal. App. 2d 211, 86 P. 2d 118 8
Martin v. The Law Society (British Columbia Court of Appeals), 8 The Advocate, 105, Vol. I, Western Weekly Reports, 1949, p. 993 22
McGinn v. Dept. of Health of San Francisco, 113 Cal. App. 228, 298 Pac. 118 4
Mugler v. Kansas, 123 U. S. 623, 31 L. Ed. 205 14
Murdock v. Clark, 53 F. 2d 155 14
Myers v. United States, 272 U. S. 52, 71 L. Ed. 160 4
National Maritime Union of America v. Herzog, 78 Fed. Supp. 146; aff'd 334 U. S. 854, 92 L. Ed. 1776 ..... 15, 17

PAGE

Northside, etc. Ass'n v. County of Los Angeles, 70 Cal. App. 2d 598, 161 P. 2d 613 13

Nunes v. Bd. of Civ. Serv. Commissioners, 88 Cal. App. 2d 632, 199 P. 2d 311 4

People v. Skidmore, 27 Cal. 287 7

Peoples Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029 7

Phelps v. Prussia, 60 Cal. App. 2d 732, 141 P. 2d 440 9

Quarrier, Ex parte, 4 W. Va. 210 21

Rabouine v. McNamara, 275 App. Div. 1052, 92 N. Y. S. 2d 110 17

Redding v. City of Los Angeles, 81 Cal. App. 2d 888, 185 P. 2d 430; appeal dism., 334 U. S. 825, 92 L. Ed. 1754 8

Risley v. Board of Civil Service Commissioners, 60 Cal. App. 2d 32, 140 P. 2d 167 8

Secombe, Ex parte, 19 How. 9, 15 L. Ed. 565 4

State v. Garesche, 36 Mo. 256 21

State ex rel. Beebe v. City of Seattle, 159 Wash. 392, 293 Pac. 459 4

State ex rel. Wingate v. Woodson, 41 Mo. 227 22

State of Indiana ex rel. Dorothy Anderson v. Harry Brand, 303 U. S. 95, 82 L. Ed. 685 9

Summers, Re, 325 U. S. 561, 89 L. Ed. 1795 8

Swars v. Council of City of Vallejo, 33 Cal. 2d 867, 206 P. 2d 355 13

Thompson v. Wallin, 95 N. Y. S. 2d 784 15

United States v. Marzani, 71 Fed. Supp. 615 16

United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U. S. 407, 65 L. Ed. 704 17

Watson v. Mercer, 8 Pet. 88, 8 L. Ed. 876 18

Whitney v. California, 274 U. S. 357, 71 L. Ed. 1095 ..... 10, 14, 17

STATUTES PAGE

California Code of Civil Procedure, Sec. 1963(15) 13
California Constitution, Art. VI, Sec. 3 16
California Constitution, Art. XI, Sec. 8 (Stats. of Calif., 1925, p. 1028) 2, 12
California Corporations Code, Secs. 35000-35302 (Stats. of Calif., 1947, Chap. 1038) 10
California Corporations Code, Sec. 35100 10
California Corporations Code, Sec. 35103 10
California Corporations Code, Sec. 35302 10
California Syndicalism and Sabotage Law (Deering's General Laws, Act 8428, Stats. of Calif., 1919, p. 281) 3, 10
Los Angeles City Charter, Sec. 80 (Stats. of Calif., 1925, p. 1058) 4, 10
Los Angeles City Charter, Sec. 112(a) (Stats. of Calif., 1945, p. 3102) 4, 10, 11
Los Angeles City Charter, Sec. 432 (Stats. of Calif., 1941, p. 3409) 3, 10, 21
Los Angeles City Ordinance No. 94,004, Sec. 1 10
Los Angeles City Ordinance No. 94,004, Secs. 1-8 ..... 2, 10, 11,
Los Angeles City Ordinance No. 94,004, Sec. 4 15
Los Angeles City Ordinance No. 94,004, Secs. 9-23 14
National Labor Relations Act, Sec. 9(h) 19
Smith Act (United States Code, Title 18, Sec. 2385) 2
United States Code, Title 18, Secs. 2381-2386 10
United States Constitution, First Amendment 12
United States Constitution, Fourteenth Amendment, Sec. 3 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 453.

RAY H. GARNER, HARRY BECKERMAN, AIDA BELDNER, JOHN B. BROWN, CARRIE L. DICK, MARY E. GRUNEWALD, EUGENE HALLETT, MARGARET B. HASKELL, EDWARD HAVENS, CORNELIUS LAWRENCE, VERA MANN, OLA ROSS PACIFICO, DANA PLATT, EUGENE REED, FRANCES SCHWARTZ, WILLARD SMART, FRANK TORREANO,

Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; CLARENCE J. DERRICK, JOSEPH O. DONOVAN, LOUIS M. DREVES, FRANK GILLELEN, EDWARD L. TAYLOR, and MILTON OFFNER, as Members of the Board of Public Works of the City of Los Angeles; BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; SAMSON A. LINDAUER, JUSTIN W. GILLETTE, CHARLES E. ARNN, RANSOM M. CALLICOTT, and MRS. IDA S. LAZARD, as Members of the Board of Civil Service Commissioners of the City of Los Angeles; DAN O. HOYE, City Controller of the City of Los Angeles; THE CITY OF LOS ANGELES, a Municipal Corporation,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION.

The respondents oppose the issuance of a writ of certiorari in this cause for the reasons that no constitutional question is presented and that in any event the decision below was clearly correct and does not conflict with any decision of this Honorable Court.

Statement of the Case.

Prior to January 6, 1949, each of the petitioners had occupied a position in the classified service of the City of Los Angeles [R. 2]. The City of Los Angeles is a municipal corporation of the State of California, organized under a freeholders' charter pursuant to Section 8 of Article XI of the Constitution of the State of California (Stats. of Calif., 1925, p. 1028).

Under the provisions of Sections 1-8 of Ordinance No. 94,004 [R. 11-13], each of the City's employees was required before January 6, 1949, to take and subscribe to an oath of allegiance to the United States and to the State of California, and to file an affidavit as to whether or not he was or had ever been a member of the Communist Party of the United States of America or of the Communist Political Association.

The oath of allegiance is in the usual form, and further includes definitive asseverations denying overt advocacies and affiliations inconsistent with the primary portion of the oath [R. 11, 12]. In addition to this undertaking of present allegiance, the oath includes a declaration as to the employee's conduct during the preceding five-year period. This portion of the oath was deemed to furnish additional security to the people of the City by seeking to insure that none of their employees had been engaged within that recent period in felonious conduct forbidden by the Smith Act (United States Code, Title 18, Section 2385) and by the California Syndicalism

and Sabotage Law (Deering's General Laws, Act 8428, Statutes of California, 1919, page 281), and was further indicated by the provisions of Section 432 of the Charter of the City of Los Angeles (Statutes of California, 1941, page 3409). That charter section provides as follows:

> "Notwithstanding any other provision of this charter, no person shall hold or retain or be eligible for any public office or employment in the service of the City of Los Angeles, in any office or department thereof, either elective or appointive, who has within five (5) years prior to the effective date of this section advised, advocated or taught, or who may, after this section becomes effective, advise, advocate or teach, or who is now or has been within five (5) years prior to the effective date of this section, or who may, after this section becomes effective, become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period of five (5) years, advised, advocated or taught the overthrow by force or violence of the government of the United States of America or of the State of California.
>
> "In so far as this section may be held by any court of competent jurisdiction not to be self-executing, the City Council is hereby given power and authority to adopt appropriate legislation for the purpose of effectuating the objects hereof."

Fifteen of the petitioners refused to sign either the oath or the affidavit; two of them, *Pacifico* and *Schwartz*,

signed the oath but not the affidavit, and thereafter all of them were discharged by the general managers of their respective departments [Charter of the City of Los Angeles, Sec. 80, Stats. of California, 1925, p. 1058, pertinent portions appear in Appendix "A"; R. 23.]

Section 112(a) of the Charter of the City of Los Angeles (Stats. of California, 1945, page 3102, set forth at length in Appendix "B" hereto) provides that an employee who has served his probationary period in the classified service of the City may be discharged only for a cause stated, and that he is entitled upon his application to a hearing by the City's Board of Civil Service Commissioners as to the sufficiency and truth of such stated cause. When it appears that there has been a full compliance with such a requirement and that the reviewing board has denied reinstatement in the exercise of its jurisdiction, the discharge is effectual and is not subject further to judicial review. (*Ex parte Secombe,* 19 How. 9, 15 L. Ed. 565; *Nunes v. Bd. of Civ. Serv. Commissioners,* 88 Cal. App. 2d 632, 637 [199 P. 2d 311]; *Brown v. Board of Police Commissioners,* 2 Cal. App. 2d 245, 251 [37 P. 2d 737]; *McGinn v. Dept. of Health of San Francisco,* 113 Cal. App. 228, 231 [298 Pac. 118]; *Boyd v. Pendegast,* 57 Cal. App. 504, 507 [207 Pac. 713]; *State ex rel. Beebe v. City of Seattle,* 159 Wash. 392 [293 Pac. 459].). (This is also the rule in the federal courts [*Myers v. U. S.,* 272 U. S. 52, 71 L. Ed. 160; *Eberlin v. U. S.,* 257 U. S. 82, 66 L. Ed. 140; *Carter v. Forrestal,* 175 F. 2d 364].)

Upon his application, the cause of the discharge of each petitioner was reviewed by the Board of Civil Service Commissioners in an open and public hearing. Each of the petitioners was present at his hearing, each was represented by counsel, and each was afforded every opportunity to present evidence and argument to the Commision [R. 5, 6, 25, 26]. After taking the matter under submission the Commission in each case entered its determination that the causes stated for the discharge were true, and that the causes stated were sufficient to sustain the discharge [R. 5, 6, 25, 26].

Issues Presented in State Court.

By their consolidated application to the Superior Court of the State of California in and for the County of Los Angeles, the petitioners sought a writ of mandate compelling their reinstatement to the positions from which they had been discharged [R. 1-10]. This petition did not bring up the record before the Civil Service Commission, nor seek its review. Thus no issues were presented to the Superior Court as to the truth of the charges, as to the sufficiency of the evidence to support the Commission's determinations, or as to the regularity of the discharges or of the procedure before the Commission. It is clear, therefore, that the petition was rested upon the single proposition that the causes stated for the petitioners' discharges were entirely insufficient, as a matter of law [R. 1 to 27].

Issues Presented on Certiorari.

It follows that the only questions presented here are these:

1. Is a federal question presented where a state court refuses to mandate a municipal corporation to reinstate a discharged employee upon the claim that the cause stated for the employee's discharge was insufficient as a matter of law?

2. Assuming that a federal question is presented is it sufficient cause for the discharge of a city employee:

(a) That he refused to take an oath of allegiance to the United States and to the State?

(b) That he refused to assert his past loyalty for a five year period?

(c) That he refused to state whether or not he had been a member of certain named organizations, where the city's legislative body had determined such information to be relevant to his employment?

Opinions Below.

Upon the petitioners' appeal to the District Court of Appeal of the State of California, Second Appellate District, the judgment of the Superior Court was affirmed in an opinion reported in 98 Advance California Appellate Reports, at page 694 [220 P. 2d 958], and appearing in the printed record at pages 40-46. Under California law the decision of the District Court of Appeal is merely an affirmation of the judgment of the Superior

Court, does not supersede that judgment, and is not itself the judgment in the case.

People v. Skidmore, 27 Cal. 287, 293;

Howard v. Howard, 87 Cal. App. 20, 26 [261 Pac. 714];

Peoples Home Sav. Bank v. Sadler, 1 Cal. App. 189, 194 [81 Pac. 1029].

Nor does the opinion of the District Court of Appeal rest on any conclusion as to the petitioners' asserted federal rights.

The petitioners' request for a hearing by the Supreme Court of California was denied by that court without opinion [R. 47].

Jurisdiction.

By statements of mere conclusions, the petitioners attempted to raise questions under the Constitution of the United States in the trial court and upon appeal [R. 7-9, 38-39], but in fact no such issues were presented by the *facts* alleged in the original petition to the Superior Court. The selection, appointment and tenure of appointed personnel in the service of the states or their political subdivisions, or in the service of municipal corporations deriving their powers from the states, are matters reserved entirely to the states. (*Kotch v. River Port Pilot Comm'rs,* 330 U. S. 552, 91 L. Ed. 1093; *Re Summers,*

325 U. S. 561, 570, 89 L. Ed. 1795, 1802; *Heim v. McCall*, 239 U. S. 175, 191, 60 L. Ed. 206, 216.)

There is no constitutional right to public employment in the State of California, and the termination of public employment under the State of California raises no constitutional question. (*Risley v. Board of Civil Service Commissioners*, 60 Cal. App. 2d 32, 38 [140 P. 2d 167]; *Ludolph v. Board of Police Commissioners*, 30 Cal. App. 2d 211, 216 [86 P. 2d 118].)

Since the matter involved is one reserved peculiarly to state action, since the administrative remedy provided is exclusive, and since no federal right in petitioners was touched, no constitutional question is presented. The petitioners cite no case, and we have found none, where any federal court has directed the reinstatement of a discharged state or municipal employee, either on the ground that his discharge was forbidden by the Constitution of the United States or on any other ground. On the contrary, each effort to secure federal intervention in such cases has been rejected, so far as we have been able to ascertain.

Redding v. City of Los Angeles, 81 Cal. App. 2d 888 [185 P. 2d 430] (appeal dismissed, 334 U. S. 825, 92 L. Ed. 1754);

Horosko v. Sch. Dist. of Mt. Pleasant, 335 Pa. 369 [6 A. 2d 866] (certiorari denied, 308 U. S. 553, 84 L. Ed. 465];

Brown v. Sch. Dist. of City of Bethlehem, 347 Pa. 418 [32 A. 2d 565] (certiorari denied, 320 U. S. 782, 88 L. Ed. 469);

City of Jackson v. McLeod, 199 Miss. 676 [24 So. 2d 319] (certiorari denied, 328 U. S. 863, 90 L. Ed. 1633);

Joyce v. Board of Education of City of Chicago, 325 Ill. 543 [60 N. E. 2d 431] (certiorari denied, 327 U. S. 786, 90 L. Ed. 1013).

In the *Joyce* case a teacher's discharge was sustained by the Appellate Court of Illinois. The prime cause stated was that she had applauded a draft law violation by a former pupil, and the determination of the school board that this was a sufficient cause was sustained by the court.

State of Indiana ex rel. Dorothy Anderson v. Harry Brand, 303 U. S. 95, 82 L. Ed. 685, involved a repeal of a tenure law rather than a discharge for cause and the decision of the Indiana Supreme Court was reversed, because, according to the majority opinion [Justice Black dissenting], there had been an impairment of contract. No claim of impairment is or could be made here, even if the petitioners had been tenured teachers. (*Phelps v. Prussia,* 60 Cal. App. 2d 732, 743-5 [141 P. 2d 440].)

Statutes Involved.

The case below arose out of Sections 80 and 112(a) of the Los Angeles Charter (Appendices "A" and "B"), and Sections 1-8 of the City's Ordinance No. 94,004 [R. 11-13].

The ordinance is connected with, although it does not depend upon, Section 432 of the Charter of the City of Los Angeles (Stats. of California, 1941, page 3409), which is set forth at length herein in our statement of the case, *supra*. (Since the enactment of this ordinance, the Legislature of the State of California has required that a similar oath be taken by all public employees [Chapter 8, Div. 4, Title 1, Government Code of California, Appendix "C"].)

The relevancy of the declarations required to be made in the oath provided in Section 1 of the Ordinance is supported by the California Syndicalism and Sabotage Law (Deering Act 8428, Stats. of California, 1919, page 281; sustained in *Whitney v. California*, 274 U. S. 357, 71 L. Ed. 1095), and by the California Subversive Organization Registration Law, first enacted in 1941 and now contained in the Corporations Code of California, Sections 35000 to 35302 (Stats. of California, 1947, Chapter 1038). The California Syndicalism and Sabotage Law is set forth at length in Appendix "D," and Sections 35000 to 35002, portions of Section 35100, Section 35103 and Section 35302 of the Corporations Code are supplied in Appendix "E." The relevancy of the requirements of the oath is also supported by the provisions of Sections 2381-2386 of Title 18 of the United States Code.

Questions Presented.

As heretofore pointed out, the only question presented to the Superior Court by the petitioners' application for mandate was solely a state question of whether or not there were sufficient causes stated for the petitioners' discharges under Section 112(a) of the City Charter (see Appendix "B").

This question presents no problem under the Federal Constitution. The questions presented by the facts alleged in the petition for mandate are not such as may be made the basis for the contentions attempted to be urged in the petition for certiorari. This is clearly so, since Sections 1-8 of Ordinance No. 94,004 carry no criminal sanctions, do not undertake on their face or as applied here to prohibit, regulate or restrict any of the liberties secured by the First or Fourteenth Amendments to the Constitution, and do not touch any person's rights or privileges to a hearing or determination under Section 112(a) of the City Charter.

Summary of Argument.

We are concerned here only with the power of the people of the City of Los Angeles to require that their own employees be loyal to their service and that they show a consistent record of loyalty for five years past.

Ordinance No. 94,004 requires only a showing of qualifications which are obviously requisite to be possessed by employees discharging a public trust. No more funda-

mental qualification could be asserted than that a public employee be dedicated to the support of the constitutional government of the United States. Such dedication, "loyalty," "allegiance," and other definitive expressions necessarily connote lawful conduct, and consequently the definitive provisions of the oath provided by Ordinance No. 94,004 require no more of the employee than such a short declaration as that required of the President by Section 8 of Article II of the Constitution. The relationship between the proper discharge of the duties of a public trust and the qualifications sought by an oath of allegiance is obvious: it is arrogant nonsense to argue, as the petitioners do in effect, that there is a constitutional right to work for the violent overthrow of the government established by the Constitution, and it is still more absurd to contend, as the petitioners do in effect, that one has an enforcible right to occupy a position of public trust and at the same time a protected right or privilege to scheme, conspire and work for the forcible overthrow of the government. To assert the deprivation, in such wise, of any First Amendment liberty is to contend that the First Amendment protects the advocacy of sabotage, terror and murder, that the First Amendment protects assemblages which purpose the overthrow of the government, and that the First Amendment prohibits any undertaking by the people of this country to defend their established constitutional government against internal conspiracies to effect its destruction.

I.

THE DECISION BELOW IS CLEARLY CORRECT.

A. Basis of Judgment.

The judgment of the Superior Court determined that the petitioners had stated no cause of action to compel their reinstatement to their former positions in the public service. The petition did not set forth or attack the evidence which was presented before the Civil Service Commission during the extended hearings which preceded the Commission's orders sustaining the petitioners' discharges; consequently that evidence could not be reviewed by the state court and may not be reviewed here. Absent the record before the Civil Service Commission, it must be assumed that no substantial evidence was presented to impeach the petitioners' discharges, and in support of the Commission's determinations, it must be assumed that the evidence fully supported them.

California Code of Civil Procedure, Section 1963(15);

Swars v. Council of City of Vallejo (1949), 33 Cal. 2d 867, 872 (206 P. 2d 355);

Lindell Co. v. Board of Permit Appeals of San Francisco (1943), 23 Cal. 2d 303, 323 (144 P. 2d 4, 15);

Cantrell v. Board of Supervisors, 87 Cal. App. 2d 471, 479 (197 P. 2d 218);

Northside, etc., Ass'n v. County of Los Angeles (1945), 70 Cal. App. 2d 598, 608 (161 P. 2d 613).

The petitioners launch an attack upon Sections 9 through 23 of the ordinance [Pet. pp. 12, 20-21; R. pp. 13-18]. Since none of those sections was involved in the cases of any of the petitioners, no question arising out of them was presented to the Civil Service Commission or to the state court, and none can be presented here.

Henneford v. Silas Mason Co., 300 U. S. 577, 583, 81 L. Ed. 814, 819;

Bandini Petroleum Co. v. Superior Court, 284 U. S. 8, 22, 76 L. Ed. 136, 145;

Whitney v. California, 274 U. S. 357, 362, 71 L. Ed. 1095, 1100.

So far as the attack upon Section 4 of the ordinance is concerned, no showing by the petitioners appears as to the nature or character of the Communist Party of the United States of America or of the Communist Political Association. Consequently, in supporting the determination of the legislative body as to the relevancy of inquiries about those organizations, and in support of the determinations of the Civil Service Commission on that issue, which was narrowly presented in the cases of the petitioners Pacifico and Schwartz, the Superior Court presumably properly assumed that the facts as to those organizations were such as would undeniably support those determinations.

Whitney v. Calif., 274 U. S. 357, 370, 371, 71 L. Ed. 1095, 1103, 1104;

Mugler v. Kansas, 123 U. S. 623, 661, 31 L. Ed. 205, 210;

Barsky v. U. S., 167 F. 2d 241, 247 (cert. denied, 334 U. S. 843, 92 L. Ed. 1767);

Murdock v. Clark, 53 F. 2d 155;

National Maritime Union of America v. Herzog, 78 Fed. Supp. 146, 163 (affirmed 334 U. S. 854, 92 L. Ed. 1776);

Lindell Co. v. Board of Permit Appeals, 23 Cal. 2d 303, 323 (144 P. 2d 4);

Thompson v. Wallin, 95 N. Y. S. 2d 784, 792.

No doubt the Superior Court assumed and this Court may assume in this connection, that the Communist Party of the United States of America is and has always been, and that the Communist Political Association during its existence was at all times, an organization completely under the domination of a foreign power and effectively administered by such foreign power through its appointed agents within the United States, an organization created and administered for the prime purpose of overthrowing the constitutional government of the United States and setting up in its place a puppet government subservient to such foreign power, an organization dedicated to the effectuation of its purposes by any and every means, without regard either to their legality or humanity, or to their effect upon the welfare of the people of the United States, and an organization having as its prime credo the belief that fraud, deception, perjury, character assassination, sabotage, riot, terror and murder are not only justifiable but praiseworthy, if only they be directed toward the destruction of the United States.

Since one of the causes stated for the discharge of each of the petitioners was that he had failed and refused to execute an affidavit pursuant to the requirements of Section 4 of Ordinance No. 94,004, and since none of the petitioners came forward before the Civil Service Commission with any evidence of the irrelevancy of the

information required to be given in such an affidavit, or alleged any facts in his petition to the Superior Court from which that court might have concluded that such information was entirely irrelevant to the petitioner's public employment, or to his qualifications therefor, such cause for the discharge of each of the petitioners was conclusively determined by the order of the Board of Civil Service Commissioners. Consequently, the sole causes stated for the discharges of Pacifico and Schwartz are here beyond review (*Keokuk and H. Bridge Co. v. Illinois*, 175 U. S. 626, 44 L. Ed. 299; *Citizens Savings Bank v. Owensboro*, 173 U. S. 636, 43 L. Ed. 840), and even if the other cause stated for the discharge of each of the fifteen other petitioners were vulnerable, the discharge of each of them would still stand, under the invariable rule of this court.

B. No Substantial Federal Question Involved.

In the petition there is really no substantial argument made that an oath of loyalty may not be exacted as a condition to public employment, and Article VI, Section 3, and Section 3 of the Fourteenth Amendment, together with the following cases, is a sufficient answer to any such assertion:

Friedman v. Schwellenbach (1946), 159 F. 2d 22 (affirming 65 Fed. Supp. 254) (cert. denied 330 U. S. 838, 91 L. Ed. 1285);

United States v. Marzani (Dist. Col. D. C.), 71 Fed. Supp. 615, 620;

Board of Education v. Jewett, 21 Cal. App. 2d 64 (68 P. 2d 404);

L'Hommedieu v. Board of Regents, 276 App. Div. 494 (95 N. Y. S. 2d 443, 453);

Koral v. Board of Education (1950), 94 N. Y. S. 2d 378, 383;

Rabouine v. McNamara (1949), 275 App. Div. 1052 (92 N. Y. S. 2d 110).

Our Constitution is not a suicide pact; it was adopted to establish and preserve our government, not to serve as a protective screen and shield for those who seek to destroy it.

American Communications Ass'n v. Douds, 339 U. S. 382, 394, 94 L. Ed. 925, 941;

Hamilton v. University of California, 293 U. S. 245, 262, 79 L. Ed. 343, 353;

Whitney v. California, 274 U. S. 357, 371, 71 L. Ed. 1095, 1104;

Gitlow v. New York, 268 U. S. 652, 668, 69 L. Ed. 1138, 1147;

United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U. S. 407, 414, 65 L. Ed. 704, 710;

Barsky v. U. S., 83 U. S. App. D. C. 127, 167 F. 2d 241, 246 (cert. denied, 334 U. S. 843, 92 L. Ed. 1767);

National Maritime Union of America v. Herzog (D. C. Dist. Col.), 78 Fed. Supp. 146, 170 (affirmed, 334 U. S. 854, 92 L. Ed. 1776);

L'Hommedieu v. Board of Regents (1950), 95 N. Y. S. 2d 443, 457.

1. The People of a City May Require That Their Servants Have Been Loyal to the Constitutional Government of the United States and the State During the Five-year Past Period.

There is left then for discussion, at the most, only the narrow question of whether or not it is a sufficient cause for his discharge that a city employee failed to comply with a requirement by the people of the city that he affirm his loyalty during the five-year preceding period. (The petitioners concede, at pages 12, 16 and 17 of their petition, that *demonstration* of their disloyalty during such period would justify discharge.) (Since the petitioners Pacifico and Schwartz are not concerned here, our references to the petitioners hereafter will exclude those two.)

The petitioners' attack on this line is that such requirement is forbidden, as being both a bill of attainder and an *ex post facto* law.

The assertion is valid in neither of these regards, and its invalidity does not depend merely upon a matter of definition in either case, although definitions alone would be sufficient answers. (A bill of attainder is a legislative determination of the guilt of named or identifiable individuals or organizations with a *concomitant* imposition of punishment (*Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356; *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366), while an *ex post facto* law is a definition of an act as criminal, after the commission of such act, with a concomitant provision for penal sanctions (*Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648; *Watson v. Mercer*, 8 Pet. 88, 8 L. Ed. 876; *L'Hommedieu v. Board of Regents*, 95 N. Y. S. 2d 443). Ordinance No. 94,004 answers neither definition).

Neither does the language of any of the opinions, or the effect of the decision, in *American Communications Association v. Douds*, 339 U. S. 383, 94 L. Ed. 925, support the petitioners' contention. There Section 9(h) of the National Labor Relations Act, requiring that officers of a labor organization file non-Communist affidavits before the organization might enjoy the privileges of the Act, was upheld. The claim was made that First Amendment liberties were involved and that the act constituted a bill of attainder. At page 390 (L. Ed. 939), the prevailing opinion states:

> "We think it is clear in addition that the remedy provided by Section 9(h) bears reasonable relation to the evil which the statute was designed to reach. Congress could rationally find that the Communist Party is not like other political parties in its utilization of positions of union leadership, * * * and that many persons who believe in overthrow of the government by force and violence are also likely to resort to such tactics when, as officers, they formulate union policy."

(Compare the affidavit provisions of Ordinance 94,004 [Secs. 3 and 4, R. 12], which do not require the employee to state that he is *not* a member of the Communist Party.)

As to the bill of attainder argument, the opinion says in part, at page 414 (L. Ed. 952):

> "Here the intention is to forestall future dangerous acts; there is no one who may not by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder."

The petitioners seize upon part of this language to support their contention that Ordinance 94,004 constitutes a bill of attainder and they say, significantly,

> "Under the terms of the Ordinance here, no 'voluntary alteration of loyalties' can possibly make the petitioners here eligible to take the oath or execute the affidavit." (Petition, p. 14.)

Were the case presented here that of one who had come forward at the time he was asked to take the oath, with an asseveration that he had indeed four years previously and prior to his city employment, been a member of a subversive organization, but that he had then repented and recanted and that he wished to continue to dedicate his life to the public service, a more appealing case would appear to have been presented to the Civil Service Commission, although the lack of jurisdiction in the state court and in this Court would still have been evident. However, none of the petitioners presented such a case. Instead, as indicated by their above quoted statement, each of them was saying to the Civil Service Commission, *in effect:*

> "I could not truthfully execute the affidavit required of me, because I am or have recently been a member of the Communist Party of the United States of America or a member of the Communist Political Association, and each of these organizations is a criminal conspiracy. Evidence of my membership consequently would lead to my prosecution under the Smith Act (Title 18, U. S. C., §2385), and under the California Syndicalism and Sabotage Law.
>
> "I could not truthfully take the oath required of me, and in view of the facts as to the Communist Party and the Communist Political Association, if

I nevertheless had taken the oath I would have subjected myself to prosecution for perjury.

"Nevertheless, I ask that you set aside my discharge, and I assert that as a matter of law you must set it aside."

Thus analyzed, it becomes all the more clear that there was no basis whatever in the petitioners' application that the Superior Court set aside the determination of the Civil Service Commission that the failure of each of the petitioners to execute the required oath was a sufficient cause for his discharge. Assuming nevertheless that such an inquiry is open here, the determination of the Civil Service Commission and of the Superior Court as to the sufficiency of that stated cause is completely invulnerable.

2. Such a Requirement Is One of Qualification Merely.

The exaction demanded by the oath so far as its retrospective provisions are concerned, is simply a statement of qualifications for positions of public trust and not in any sense a penal ordinance. Quite apart from the support given these portions of the oath by Section 432 of the Charter, they amount merely to this: that the people of the City are not content merely to review the present self-asserted present loyalties of their employees, but insist as well that their employees assert a five-year record of innocence of overt sedition or conspiracy.

This type of protective insurance is not unusual even in matters relating to the licensing of lawyers and others who seek to enjoy special privileges affected with the public interest (see *Cohen v. Wright*, 22 Cal. 293; *State v. Garesche*, 36 Mo. 256; *Ex parte Hunter*, 2 W. Va. 122; *Ex parte Quarrier*, 4 W. Va. 210; *Blair v. Ridgely*,

41 Mo. 63; *State ex rel Wingate v. Woodson,* 41 Mo. 227; *Martin v. The Law Society* (British Columbia Court of Appeals), 8 The Advocate, 105, Vol. I, Western Weekly Reports, 1949, p. 993), and is common in matters relating to public employment. Few, if any, governmental entities complete appointments to the public service without rather searching inquiries as to the applicant's history as to criminal offenses, personal sobriety and good conduct, and it is common experience that applications for public employment are frequently rejected because of evidence or even sound suspicion that the applicant has been defiant of the law, addicted to drink, or disposed to unconventional conduct. (See *Crampton v. O'Mara,* 193 Ind. 551, 139 N. E. 360 [writ of error dismissed, 267 U. S. 575, 69 L. Ed. 795].) Obviously, in such cases the relevancy of those past matters consist in the assumption that evidence of past conduct supports valid conclusions as to present character and that unreliable character prophesies harmful future conduct.

In evidence of past misdemeanors, despite the applicant's vigorous protestations that he will observe police ordinances in the future, can validly support a refusal to appoint to a public position or a discharge from a public position, can there be any doubt of the propriety of a requirement that public servants must have been at least passively loyal for a five-year past period? Each of the retrospective statements of the oath here involves conduct defined as felonious by both federal and state law, and even if that were not the case the interest of the people in such past conduct by their servants would be inescapably required for the protection of the people's government.

II.

There Is No Conflict Between the Judgment Below and Any Decision of This Court.

There is no conflict between the judgment below and any decision of this Court, nor is there any conflict between the opinion of the District Court of Appeal and any decision of this Court.

The petitioners seek to spell out a conflict between a part of the prevailing opinion in *American Communications Association v. Douds*, 339 U. S. 382, 94 L. Ed. 925, and the judgment below. There is no conflict here with the result there. As the Court said there (339 U. S. at 392, 94 L. Ed. at 940):

> "If no more were involved than possible loss of position, the foregoing would dispose of the case."

Nor is there any conflict of language, as we have previously pointed out.

Neither is there any conflict between the decision here and the decisions in *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366, and *Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356. The ordinance here was narrowly drawn to touch only fundamental loyalties to the existing constitutional government and threatens no social, economic or political belief whatever. In *Cummings* and *Garland*, on the other hand, no question was involved of the power or right of the states to examine the fundamental loyalties of their own servants. And as this Court pointed out in *Hawker v. People of the State of New York*, 170 U. S. 189, 198-200, 42 L. Ed. 1002, 1006-1007, since

many of the matters contained in the oaths there were entirely irrelevant to the qualifications of the parties to perform the duties of a Catholic priest and of a lawyer, the oaths had to be considered in the nature of penalties for past offenses rather than as legitimate tests of qualifications.

As this Court said in the *Douds* case at page 413 (94 L. Ed. 952), with respect to the rule of the *Garland* and *Cummings* cases:

> "* * * there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that . . . (the statute) is intended to prevent future action rather than to punish past action."

Conclusion.

There is here no police action, no censorship, no coercion, no condemnation without a hearing. There is only an inquiry by a city of its employees about matters which were not shown to be irrelevant, and which this Court knows *are* relevant, followed by discharges after full and fair hearings for refusals to answer such inquiries.

It is respectfully submitted that no cause for review appears.

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APPENDIX "A."

SECTION 80 OF THE CHARTER OF THE CITY OF LOS ANGELES.

(Statutes of California 1925, page 1058)

"Subject to the provisions of this charter, the rules of the department and the instruction of his board, said general manager shall have the power and duty:

(1) To administer the affairs of the department as its chief administrative officer;

(2) To appoint, discharge, suspend, or transfer the employees of the department, * * *, and to issue instructions to said employees, * * * in the line of their duties, all subject to the Civil Service provisions of the charter;

* * * * * * * * *

APPENDIX "B."

SECTION 112(a) OF THE CHARTER OF THE CITY OF LOS ANGELES.

(Statutes of California 1945, page 3402)

"Any board or officer having the power of appointment of officers, members and employees in any department of the government of the city shall have the power to remove, discharge or suspend any officer, member or employee of such department; but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause, which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing such removal, discharge or suspension shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing,

that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed, discharged or suspended to be reinstated or restored to duty. The order of said board with respect to such removal, discharge or suspension shall be forthwith certified to the appointing board or officer, and shall be final and conclusive; provided, that the order of any appointing board or officer suspending any person because of lack of funds in such department shall be final, and shall not be subject to review by said Board of Civil Service Commissioners. If the Board of Civil Service Commissioners shall order that any person removed, discharged or suspended under the provisions of this section be reinstated or restored as above provided, the person so removed, discharged or suspended shall be entitled to receive compensation from the city the same as if he had not been removed, discharged or suspended by the appointing board or officer."

APPENDIX "C."

An act to add Chapter 8 to Division 4, Title 1, of the Government Code, relating to an oath or affirmation of allegiance for civil defense workers and public employees, declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

SECTION 1. Chapter 8 is added to Division 4, Title 1 of the Government Code, to read:

CHAPTER 8. OATH OR AFFIRMATION OF ALLEGIANCE FOR CIVIL DEFENSE WORKERS AND PUBLIC EMPLOYEES.

3100. It is hereby declared that the defense of the civil population during the present state of world affairs is of paramount state importance requiring the undivided attention and best efforts of our citizens. In furtherance of such defense and in the exercise of police power of the State in profection of its citizens, all public employees are hereby declared to be civil defense workers subject to such civilian defense activities as may be assigned to them by their superiors or by law.

3101. For the purpose of this chapter the term "civil defense worker" includes all public employees and all volunteers in any civilian defense organization accredited by the State Disaster Council. The term "public employees" includes all persons employed by the State or any county, city, city and county, state agency or public district, excluding aliens legally employed.

3102. Subject to the provisions of Section 3 of Article XX of the Constitution, all civil defense workers shall

within the first 30 days of employment take and subscribe to the oath or affirmation required by this chapter.

3103. The oath or affirmation required by this chapter is as follows:

"I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties upon which I am about to enter.

"And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows:

.....

(If no affiliations, write in the words, 'No Exceptions')

and that during such time as I am a member or employee of the.....I will not advocate nor be-

(name of public agency)

come a member of any party or organization, political or otherwise, that advocates the overthrow of the Govern-

ment of the United States or of the State of California by force or violence or other unlawful means."

3104. The oath or affirmation may be taken before any officer authorized to administer oaths.

No fee shall be charged by any person before whom the oath or affirmation is taken and subscribed.

3105. The oath or affirmation of any civil defense worker of the State shall be filed with the State Personnel Board within 30 days of the date on which it is taken and subscribed.

The oath or affirmation of any civil defense worker of any county shall be filed in the office of the county clerk of the county.

The oath or affirmation of any civil defense worker of any city shall be filed in the office of the city clerk of the city.

The oath or affirmation of any civil defense worker of any other agency or district shall be filed with such officer or employee of the agency or district as may be designated by such agency or district.

3106. Compliance with this chapter shall, as to state employees, be deemed full compliance with Chapter 4, Part 1, Division 5, Title 2 of this code, requiring taking of oaths by state employees.

3107. No compensation nor reimbursement for expenses incurred shall be paid to any civil defense worker by any public agency unless such civil defense worker has taken and subscribed to the oath or affirmation required by this chapter. It shall be the duty of the person certifying to public pay rolls to ascertain and certify that such civil defense worker has taken such oath or affirmation.

3108. Every person who, while taking and subscribing to the oath or affirmation required by this chapter, states as true any material matter which he knows to be false, is guilty of perjury, and is punishable by imprisonment in the state prison not less than one nor more than 14 years.

3109. Every person having taken and subscribed to the oath or affirmation required by this chapter, who while in the employ of, or service with, the State or any county, city, city and county, state agency, public district, or civilian defense organization advocates or becomes a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States by force or violence or other unlawful means, is guilty of a felony, and is punishable by imprisonment in the state prison not less than one or more than 14 years.

SEC. 2. Subject to the provisions of Section 3 of Article XX of the Constitution, all persons designated in Chapter 8, Division 4, Title 1, of the Government Code as civil defense workers, on the effective date of this act shall, within 30 days, take and subscribe to the oath or affirmation required by Chapter 8, Division 4, Title 1, of the Government Code. Any public employee who is on authorized leave on the thirtieth day after the effective date of this act shall take and subscribe said oath or affirmation within 30 days of his return to work.

SEC. 3. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

SEC. 4. This act is an urgency measure necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

During the present emergency in world affairs loyalty and allegiance to the United States and the principles for which it stands are of utmost importance. Immediate assurance that persons in civil defense are loyal to this government and are not in fact advocates of its overthrow by force or violence is essential to the well-being of the State and Nation and the confidence of the people. It is therefore necessary that this act take effect immediately.

APPENDIX "D."

ACT 8428. CALIFORNIA SYNDICALISM AND SABOTAGE LAW.

(Statutes of California 1919, page 281)

"An act defining criminal syndicalism and sabotage, prescribing certain acts and methods in connection therewith and in pursuance thereof and providing penalties and punishments therefor.

"Section 1. *'Criminal syndicalism' defined.* The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

"Sec. 2. *Unlawful acts: Penalty.* Any person who:

1. By spoken or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

"2. Willfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or

"3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising, criminal syndicalism; or

"4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; or

"5. Willfully by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

"Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than fourteen years.

"Sec. 3. *Constitutionality of act.* If for any reason any section, clause or provision of this act shall by any court be held unconstitutional then the legislature hereby declares that, irrespective of the unconstitutionality so determined of such section, clause or provision, it would have enacted and made the law of this state all other sections, clauses and provisions of this act.

"Sec. 4. *Urgency clause.* Inasmuch as this act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this state advocating, teaching and practicing criminal syndicalism, this act shall take effect upon approval by the governor."

APPENDIX "E."

TITLE 5 OF THE CORPORATIONS CODE OF THE STATE OF CALIFORNIA.

"Subversive Organization Registration Law."

"Sec. 35000. *Short title.* This title may be cited as the Subversive Organization Registration Law.

"Sec. 35001. *Purpose of title.* This title is enacted in the exercise of the police power of this State for the protection of the public peace and safety by requiring the registration of subversive organizations which are conceived and exist for the purpose of undermining and eventually destroying the democratic form of government in this State and in the United States.

"Sec. 35002. *'Subversive organization' defined.* As used in this title, 'subversive organization' means every corporation, association, society, camp, group, bund, political party, assembly, and every body or organization composed of two or more persons or members, which comes within either or both of the following descriptions:

"(a) Which directly or indirectly advocates, advises, teaches, or practices, the duty, necessity, or propriety of controlling, conducting, seizing, or overthrowing the Government of the United States, of this State, or of any political subdivision thereof by force or violence.

"(b) Which is subject to foreign control as defined in Section 35003.

* * * * * * * * *

"Sec. 35100. *Information and documents to be filed.* Every subversive organization in existence on September 13, 1941, shall within 30 days after that date, and every

subversive organization thereafter organized shall within 10 days after its organization, file with the Secretary of State, on such forms and in such detail as he may prescribe, the following information and documents:

"(a) A complete and detailed statement subscribed, under oath, by all of its officers, showing all of the following:

"(1) Its name and post-office address.

"(2) The names and addresses of all its branches, chapters, and affiliates.

"(3) The names, nationalities, and residence addresses of its officers and members, and the qualifications required for membership in it.

"(4) The nature and extent of its existing and proposed aims, purposes, and activities.

"(5) The times and places of its meetings.

* * * * * * * * *

"(b) A true copy, certified by all of its officers, of all of the following:

"(1) Its charter, articles of association, or constitution, and its by-laws, rules and regulations.

"(2) Its oath, affirmation, or pledge of membership, if any.

"(3) Each agreement, resolution, and other instrument or document relating to its organization, powers, and purposes and the powers and duties of its officers and members.

"(4) Each book, pamphlet, leaflet, or other printed, written, or illustrated matter directly or indirectly issued

or distributed by it or in its behalf, or to or by its members with its knowledge, consent, or approval.

* * * * * * * * *

"(c) A description of the uniforms, badges, insignia, or other means of identification prescribed by it, and worn or carried by its officers or members, or any of such officers or members.

"(d) In case it is subject to foreign control, a statement of the manner in which it is so subject.

* * * * * * * * *

"Sec. 35103. *Statement of new members.* Every subversive organization shall at least once in each period of six months file with the Secretary of State a statement subscribed under oath by all of its officers showing the names and residence addresses of all persons who have been admitted to membership during that period or, if no members have been admitted during that period, a statement to that effect similarly subscribed.

* * * * * * * * *

"Sec. 35302. *Membership in and attending meeting of organization.* Any person who becomes or remains a member of any subversive organization, or attends a meeting thereof, with knowledge that the organization has failed to comply with any provision of this title, is guilty of a misdemeanor punishable by fine of not less than ten dollars ($10) nor more than one thousand dollars ($1,000), or by imprisonment in the county jail for not less than 10 days nor more than one year, or by both."

Service of the within and receipt of a copy thereof is hereby admitted this.....day of February, A. D. 1951.

2-13-51—60

SUPREME COURT, U.S.

FILED

APR 20 1951

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 453.

RAY H. GARNER, HARRY BECKERMAN, AIDA BELDNER, JOHN B. BROWN, CARRIE L. DICK, MARY E. GRUNEWALD, EUGENE HALLETT, MARGARET B. HASKELL, EDWARD HAVENS, CORNELIUS LAWRENCE, VERA MANN, OLA ROSS PACIFICO, DANA PLATT, EUGENE REED, FRANCES SCHWARTZ, WILLARD SMART, FRANK TORREANO,

Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; CLARENCE J. DERRICK, JOSEPH O. DONOVAN, LOUIS M. DREVES, FRANK GILLELEN, EDWARD L. TAYLOR, and MILTON OFFNER, as Members of the Board of Public Works of the City of Los Angeles; BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; SAMSON A. LINDAUER, JUSTIN W. GILLETTE, CHARLES E. ARNN, RANSOM M. CALLICOTT, and MRS. IDA S. LAZARD, as Members of the Board of Civil Service Commissioners of the City of Los Angeles; DAN O. HOYE, City Controller of the City of Los Angeles; THE CITY OF LOS ANGELES, a Municipal Corporation,

Respondents.

ON CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

RESPONDENTS' BRIEF.

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SUBJECT INDEX

PAGE

Opinions below 1

Jurisdiction 2

Questions presented 3

Preliminary statement 3

Statutes involved 6

Statement of the case 7

Summary of argument 12

Argument 16

Point I. When the petitioners' essential contentions are analyzed and accurately stated they are seen to be entirely invalid and to fail to raise even a doubtful question under the Constitution 16

Statement of premises—the bases of democratic government 19

The government of the United States is the people of the United States 19

Ultimate power is constitutionally in the people 21

The people cannot surrender their power 22

Revolution is not political activity 24

Constitutional rights are established for the preservation of the democratic system 25

Point II. The decisions of this court establish the proposition that the Constitution does not create or protect any claimed right to advise, advocate or teach the forcible overthrow of the governments of the United States or of the several states 27

Point III. The petitioners' discharge for their refusal as employees under the state to obey the legislative directive here involved violated no liberties secured by the Constitution and was not forbidden thereby 31

PAGE

(1) This court will not strike down state action unless such exercise of authority by the people of the state is clearly forbidden by the Constitution 34

(2) Legislation comes to this court "encased in the armor wrought by prior legislative determination." All possible intendments support the legislation and in its support it will be presumed that the legislature found the existence of any and every fact which might be necessary to exist in order to support the necessity and propriety of the statute 36

(3) This court is not concerned with the wisdom of the legislation before it, and may not substitute its judgment for that of the legislature 37

(4) There is no property right in public employment; a public employee has no proprietary interest in his position and the requirements of due process therefore have no application in a controversy between a state and its employees which arises solely out of such statutory employment relationship 37

(5) In matters involving the exercise of executive discretion in administrative affairs of government, as in the field of personnel administration, the courts will not interfere, particularly when a statute declares an administrative determination to be final and conclusive 40

A. The Constitution does not forbid a requirement by the people of a state that their employees promise allegiance to the United States and to the state 43

B. The Constitution does not forbid a requirement by the people of a state that their employees assert their allegiance during the period of the past five years 46

PAGE

1. The oath requirement did not compel the petitioners to testify against themselves, and in any event, no provision of the Constitution prohibits such state action as that here under consideration 50

2. The oath requirement does not, either on its face or as applied here, constitute a bill of attainder or an ex post facto law in contravention of Article I, Section 10 of the Constitution 51

C. The Constitution does not forbid a requirement by the people of a state that their employees disclose information relevant to their employment. Where the legislative body requires the disclosure of specified information, the intendments of such legislation establish the relevancy of the information requested, unless it appears on the face of the statute not to be at all relevant, and otherwise the presumption of the statute must stand unless there is pleading and proof that the information requested is wholly irrelevant 55

Point IV. The petitioners' briefs and petition 61

Point V. The ultimate contentions of amicus curiae, the American Civil Liberties Union, are invalid and without support in the decisions of this court 65

The judicial department is not concerned with wisdom or policy 65

The court is not concerned with the administrative operations of the state 67

The contentions of the amicus must fail for like vulnerability with those of the petitioners 68

Conclusion 69

INDEX TO APPENDIX

PAGE.

I.

Section 80 of the Charter of the City of Los Angeles (Statutes of California, 1925, page 1058) 1

II.

Section 112(a) of the Charter of the City of Los Angeles (Statutes of California, 1945, page 3102) 1

III.

Los Angeles City Ordinance No. 94,004 3

IV.

Government Code of California, Title I, Division 4, Chapter 8 6

V.

Government Code of California, Section 1028 10

VI.

Military and Veterans Code of California, Section 616 11

VII.

Act 8428, California Syndicalism and Sabotage Law (Statutes of California, 1919, page 281) 11

VIII.

Title 5 of the Corporations Code of the State of California 14

IX.

Title 18, United States Code, Sections 2381-2385, inclusive 17

TABLE OF AUTHORITIES CITED

CASES	PAGE
Abrams v. United States, 250 U. S. 616, 63 L. Ed. 1173	28
Adamson v. California, 332 U. S. 46, 91 L. Ed. 1903	51
American Communications Association v. Douds, 339 U. S. 382, 94 L. Ed. 925	14, 30, 34, 36, 37, 44, 57
Bailey v. Richardson, 182 F. 2d 466	39, 40, 43
Barsky v. United States, 167 F. 2d 241; cert. den., 334 U. S. 843, 92 L. Ed. 1767	18, 57, 59
Boutwell v. State Board of Equalization, 94 Cal. App. 2d 945, 212 P. 2d 220	39
Boyd v. Pendegast, 57 Cal. App. 504, 207 Pac. 713	38, 41
Bridges v. California, 314 U. S. 252, 86 L. Ed. 192	34
Broadwax v. Missouri, 219 U. S. 285, 55 L. Ed. 219	37
Bute v. Illinois, 333 U. S. 640, 92 L. Ed. 988	34, 51
Butler v. Pennsylvania, 10 How. 402, 13 L. Ed. 472	39
Butterworth v. Boyd, 12 Cal. 2d 140, 82 P. 2d 434	12, 39
Canteline v. McClellan, 282 N. Y. 166, 25 N. E. 2d 972	45, 49
Carolene Products Company v. United States, 328 U. S. 18, 89 L. Ed. 15	36
Carter, In re Matter of, 141 Cal. 316, 74 Pac. 997	39
Carter v. Forrestal, 175 F. 2d 364	39, 40
Christal v. Police Commission, 33 Cal. App. 2d 564, 92 P. 2d 416	50
Cohen v. Wright, 22 Cal. 293	8, 53
Communist Party v. Peek, 20 Cal. 2d 536, 127 P. 2d 889	57, 61, 62
Crampton v. O'Mara, 193 Ind. 551, 139 N. E. 360; appeal dism., 267 U. S. 575, 69 L. Ed. 795	49
Cummings v. Missouri, 4 Wall. 277, 18 L. Ed. 356	47, 54
Danskin v. San Diego, 28 Cal. 2d 536, 171 P. 2d 885	61
Debs v. United States, 249 U. S. 211, 63 L. Ed. 566	27

PAGE

Decatur v. Paulding, 14 Pet. 497, 10 L. Ed. 559 ..... 40, 41
DeJonge v. Oregon, 299 U. S. 353, 81 L. Ed. 278 61
Dent v. West Virginia, 129 U. S. 114, 32 L. Ed. 623 ..... 49, 54
Dodge v. Board of Education, 302 U. S. 74, 82 L. Ed. 57 39
Duncan, In re, 139 U. S. 449, 35 L. Ed. 219 23
Dunne v. United States, 138 F. 2d 137; cert. den., 320 U. S. 790, 88 L. Ed. 476 57
Dworken v. Collopy, 91 N. E. 2d 564 8
Eberlein v. United States, 257 U. S. 82, 66 L. Ed. 140 40
Everson v. Board of Education, 330 U. S. 1, 91 L. Ed. 711 20
Fletcher v. Peck, 6 Cranch 87, 3 L. Ed. 162 14
French v. Senate, 146 Cal. 604, 80 Pac. 1031 39
Friedman v. Schwellenbach, 159 F. 2d 22; cert. den., 330 U. S. 838, 91 L. Ed. 1285 41
Frohwerk v. United States, 249 U. S. 204, 63 L. Ed. 561 27
Garland, Ex parte, 4 Wall. 333, 18 L. Ed. 366 ..... 47, 54
Gerende v. Board, ... Md. ....., ... A. 2d ....., No. 577 44
Gitlow v. New York, 268 U. S. 652, 69 L. Ed. 1138 ..... 28, 29, 56
Graves v. Minnesota, 272 U. S. 425, 71 L. Ed. 331 ..... 34, 36
Hamilton v. University of California, 293 U. S. 245, 79 L. Ed. 343 51
Hawker v. New York, 170 U. S. 189, 42 L. Ed. 1002 ..... 49, 54
Heike v. United States, 227 U. S. 131, 57 L. Ed. 450 50
Imbrie v. Marsh, 3 N. J. 578, 71 A. 2d 352 45
James v. Marinship Corporation, 25 Cal. 2d 721, 155 P. 2d 329 ..... 61, 62
Keim v. United States, 177 U. S. 290, 44 L. Ed. 774 40
Kotch v. River Port Pilot Commissioners, 330 U. S. 552, 91 L. Ed. 1093 31
Kovacs v. Cooper, 336 U. S. 77, 93 L. Ed. 513 34
Levine v. Farley, 107 F. 2d 186; cert. den., 308 U. S. 622, 84 L. Ed. 519 40

PAGE

Levitch v. Board of Education, 243 N. Y. 373, 153 N. E. 495.... 42
L'Hote v. New Orleans, 177 U. S. 587, 44 L. Ed. 899..... 37
Livingstone v. MacGillivary, 1 Cal. 2d 546, 36 P. 2d 622..... 12
Lockheed Aircraft Corporation v. Superior Court, 28 Cal. 2d 481, 171 P. 2d 21.....24, 45
Ludolph v. Board of Police Commissioners, 30 Cal. App. 2d 211, 86 P. 2d 118..... 39
Luther v. Borden, 7 How. 1, 12 L. Ed. 581..... 23
May v. United States, 175 F. 2d 994; cert. den., 338 U. S. 830, 94 L. Ed. 505..... 50
McCray v. United States, 195 U. S. 27, 49 L. Ed. 78..... 14
McGinn v. Board of Health, 113 Cal. App. 228, 398 Pac. 118.... 42
Mugler v. Kansas, 123 U. S. 623, 31 L. Ed. 205.....34, 36
Myers v. United States, 272 U. S. 52, 71 L. Ed. 160.....49, 64
Near v. Minnesota, 283 U. S. 697, 75 L. Ed. 1357.....29, 35
Nider v. City Commission, 36 Cal. App. 2d 14, 97 P. 2d 293.... 39
O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S. 251, 75 L. Ed. 324..... 36
Osman v. Douds, 339 U. S. 846, 94 L. Ed. 1328..... 57
Pasadena v. Charleville, 215 Cal. 384, 10 P. 2d 745..... 12
Patterson v. Board of Supervisors of Los Angeles County, 79 Cal. App. 2d 670, 180 P. 2d 945..... 10
People v. Fox, 66 Cal. App. 287, 226 Pac. 14..... 26
People v. Lloyd, 394 Ill. 23, 136 N. E. 505..... 26
People v. Steelik, 187 Cal. 361, 203 Pac. 78..... 57
Perkins v. Lukens Steel Co., 310 U. S. 113, 84 L. Ed. 1108..... 40
Phelps v. Board of Education, 300 U. S. 319, 81 L. Ed. 674..... 39
Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158..... 51
Quicksall v. Michigan, 339 U. S. 660, 94 L. Ed. 1188..... 51
RD-DR Corporation v. Smith, 183 F. 2d 562; cert. den., 340 U. S. 853, 95 L. Ed. 40..... 15

PAGE

Risley v. Board of Civil Service Commissioners, 60 Cal. App. 2d 32, 140 P. 2d 167 38

Sawyer, Ex parte, 124 U. S. 200, 31 L. Ed. 402 39

Schaefer v. United States, 251 U. S. 466, 64 L. Ed. 360 28

Schenck v. United States, 249 U. S. 47, 63 L. Ed. 470 27

Schneiderman v. United States, 320 U. S. 118, 87 L. Ed. 1796 ..... 44, 57, 63

Snowden v. Hughes, 321 U. S. 1; 88 L. Ed. 497 33

Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674 51

Souder v. Philadelphia, 305 Pa. 1, 156 Atl. 245, 77 A. L. R. 610 40

State ex rel. Beebe v. City of Seattle, 159 Wash. 392, 293 Pac. 459 40

Steiner v. Darby, 337 U. S. 929, 93 L. Ed. 1737, 88 Cal. App. 2d 481, 199 P. 2d 429; dismissed, 338 U. S. 327, 94 L. Ed. 144 ..... 61, 62

Stromberg v. California, 283 U. S. 359, 75 L. Ed. 1117 29

Summers, Re, 325 U. S. 561, 89 L. Ed. 1795 ..... 53, 64

Sweatt v. Painter, 339 U. S. 629, 94 L. Ed. 1114 31

Taylor v. Beckham, 178 U. S. 548, 44 L. Ed. 1187 ..... 23, 31, 32, 39

Terminiello v. Chicago, 337 U. S. 1, 93 L. Ed. 1131 ..... 35, 44

Thomas v. Collins, 323 U. S. 516, 89 L. Ed. 430 34

Thompson v. Wallin, 301 N. Y. 476, 95 N. E. 2d 806 43

Tolman v. Underhill, ... A. C. A. ...., (.... P. 2d ....) 61, 62, 63

Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97 51

Union Pacific Railroad Co. v. United States, 99 U. S. 700, 25 L. Ed. 496 14

United Public Workers v. Mitchell, 330 U. S. 75, 91 L. Ed. 754 39

United States v. Carolene Products Co., 304 U. S. 144, 82 L. Ed. 1234 37

United States v. Dennis, 183 F. 2d 2.1 ..... 30, 43, 57

United States v. Josepheson, 165 F. 2d 82; cert. den., 333 U. S. 838, 92 L. Ed. 1122 18

PAGE

United States v. Lovett, 328 U. S. 303, 90 L. Ed. 1252.....47, 54
United States ex rel. Dunlap v. Black, 128 U. S. 40, 32 L. Ed. 354 40
United States ex rel. Milwaukee Social Democratic Club v. Burleson, 255 U. S. 407, 65 L. Ed. 704..... 45
Wall v. Board of Regents, 38 Cal. App. 2d 698, 102 P. 2d 533.... 62
Whitney v. California, 274 U. S. 357, 71 L. Ed. 1095....6, 28, 29, 34
Wilson v. North Carolina, 169 U. S. 586, 42 L. Ed. 865..... 32
Wolf v. Colorado, 338 U. S. 25, 93 L. Ed. 1782..... 51
Yale, Ex parte, 24 Cal. 241..... 53

STATUTES

California Code of Civil Procedure, Sec. 1107..... 10
California Corporations Code, Secs. 35000-35302..... 7
California Corporations Code, Sec. 35100..... 7
California Corporations Code, Sec. 35103..... 7
California Corporations Code, Sec. 35302..... 7
California Government Code, Title I, Div. 4, Chap. 8..... 6
California Government Code, Sec. 1028.....7, 60
California Labor Code, Sec. 1941..... 46
California Military and Veterans Code, Sec. 616..... 7
California Statutes of 1925, p. 1028..... 7
California Statutes of 1925, p. 1058.....6, 9
California Statutes of 1935, p. 2340..... 46
California Statutes of 1941, p. 3409.....6, 8, 47, 48, 53, 60
California Statutes of 1945, p. 3102.....6, 9, 12, 41, 52
California Statutes of 1947, Chap. 1038..... 7
California Syndicalism and Sabotage Law (Deering's Gen. Laws, Act 8428; Stats. Cal., 1919, p. 281).....6, 8, 48
Internal Security Act of 1950, Chap. 1024 (Pub. Law 831)..... 7
Los Angeles City Charter, Sec. 80 .....6, 9
Los Angeles City Charter, Sec. 103..... 46

PAGE

Los Angeles City Charter, Sec. 112(a) 6, 9, 12, 41, 52
Los Angeles City Charter, Sec. 432 ..... 6, 8, 47, 48, 53, 60
Los Angeles City Ordinance No. 94,004, Sec. 1 ..... 6, 60
Los Angeles City Ordinance No. 94,004, Secs. 1-8 ..... 6, 7
Los Angeles City Ordinance No. 94,004, Sec. 2 60
Los Angeles City Ordinance No. 94,004, Sec. 3 60
Los Angeles City Ordinance No. 94,004, Sec. 4 ..... 11, 60
New York Education Law, Sec. 890 42
United States Code, Title 18, Secs. 2381-2385 7
United States Code, Title 18, Sec. 2385 ..... 8, 48
United States Constitution, Art. I, Sec. 10 ..... 14, 20, 38, 47, 49
United States Constitution, Art. II, Sec. 1 ..... 3, 44
United States Constitution, Art. II, Sec. 8 45
United States Constitution, Art. IV, Sec. 4 ..... 17, 20, 32
United States Constitution, Art. VI, Sec. 3 ..... 3, 44
United States Constitution, First Amendment 16, 18, 26, 29, 31, 34
United States Constitution, Fifth Amendment 14, 50
United States Constitution, Fourteenth Amendment 3, 14, 20, 37, 44, 50

TEXTBOOKS

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MISCELLANEOUS

House Report 9490, 2 U. S. Code Congressional Service, 81st Cong., 2d Sess., 1950, p. 3886 44
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 453.

RAY H. GARNER, HARRY BECKERMAN, AIDA BELDNER, JOHN B. BROWN, CARRIE L. DICK, MARY E. GRUNEWALD, EUGENE HALLETT, MARGARET B. HASKELL, EDWARD HAVENS, CORNELIUS LAWRENCE, VERA MANN, OLA ROSS PACIFICO, DANA PLATT, EUGENE REED, FRANCES SCHWARTZ, WILLARD SMART, FRANK TORREANO,

Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; CLARENCE J. DERRICK, JOSEPH O. DONOVAN, LOUIS M. DREVES, FRANK GILLELEN, EDWARD L. TAYLOR, and MILTON OFFNER, as Members of the Board of Public Works of the City of Los Angeles; BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; SAMSON A. LINDAUER, JUSTIN W. GILLETTE, CHARLES E. ARNN, RANSOM M. CALLICOTT, and MRS. IDA S. LAZARD, as Members of the Board of Civil Service Commissioners of the City of Los Angeles; DAN O. HOYE, City Controller of the City of Los Angeles; THE CITY OF LOS ANGELES, a Municipal Corporation,

Respondents.

ON CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

RESPONDENTS' BRIEF.

Opinions Below.

On March 5, 1951, this Court granted certiorari to the District Court of Appeal of the State of California, Second Appellate District. The opinion of the District Court

of Appeal is reported in 98 California Appellate Reports 2d Series, at page 493 (220 P. 2d 958), and appears in the printed record at pages 40 to 46. The decision of the District Court of Appeal affirmed the judgment of the Superior Court of the State of California in and for the County of Los Angeles. That judgment denied the issuance of an alternative writ of mandate to direct the respondents to reinstate the petitioners in positions in the service of the City of Los Angeles. The Superior Court rendered no opinion. The petition filed in the Superior Court appears in the printed record at pages 1 to 27. The respondents' opposition thereto appears in the printed record at pages 28 to 31. The order and judgment of the Superior Court appears in the printed record at pages 32 to 33.

The petitioners' request for a hearing by the Supreme Court of California was denied by that court without opinion. (98 Cal. App. 2d 493, 499, 220 P. 2d 958.) [R. 47.]

Jurisdiction.

The petitioners attempt here to raise questions under the Constitution of the United States. They sought to raise these questions before the Civil Service Commission, in the trial court, and upon appeal, by statements of mere conclusions, unsupported by any evidence offered before the Civil Service Commission or by any allegations of fact in the petition to the trial court.

That not even a doubtful question under the Constitution of the United States is presented here will be fully shown under Points I and II of the respondents' argument herein.

Questions Presented.

Preliminary Statement.

This proceeding involves considerations of political theory, government, national interest, loyalty, security and the like, and hence offers opportunities for the injection of emotionalism and for confusion of terms. Definitions, therefore, will be helpful.

We are using the word "allegiance" as comprehending (1) the tie or obligation of a citizen of the United States of America to the Constitution of the United States and to the government established by that Constitution; (2) the obligation of such a citizen to the state of which he is also a citizen, and (3) the devotion or loyalty, and the obedience and service which is implicit in such relations. (See Webster's New International Dictionary, Second Edition, Unabridged, G. & C. Merriam Company.)

All of this is obviously comprehended by the oath required of the President of the United States by Article II, Section 1 of the Constitution, and in the oaths referred to in Section 3 of the Fourteenth Amendment and required of officers of the United States and of the states by Article VI, Section 3, and is clearly included in all of the familiar oaths of like kind and effect. Clearly, any such oath includes an undertaking not to advocate, advise or teach the forcible overthrow of the governments established by the Constitutions of the United States and of the several states, and an undertaking that the citizen will not knowingly belong to or affiliate with any organization which advocates, advises or teaches such forcible revolution. These things are clear and implicit in any oath of allegiance, whether they are spelled out or not, and we shall

use the term "allegiance" and the term "oath of allegiance" upon these obvious assumptions.

With this understanding, the immediate questions presented are the following:

1. Does the discharge of a city employee, who has only such tenure as is secured by state law, present any question under the Constitution of the United States, where the separable causes of the discharge of such employee are:

(a) That he refused to take an oath of allegiance to the United States and to the State;

(b) That he refused to assert his adherence to such allegiance during the period of the past five years;

(c) That he refused to state whether or not he had been a member of certain named organizations, where the city's legislative body had determined such information to be relevant to his employment, there being not even an offer of proof that such information was wholly irrelevant?

2. Assuming that doubtful questions under the Constitution are thus presented, the following questions arise:

(a) Does the Constitution of the United States create and protect (1) a right to advise, advocate or teach the violent overthrow of the federal and state governments established and guaranteed by the Constitution; (2) a right to organize and affiliate with others for the purpose and with the effect of conducting such activities, and (3) a right at the same time to occupy a position under a state, immune from inquiry by the people of the state as to such activities?

(b) If the Constitution of the United States does not create and protect such rights, does it nevertheless create and protect a right to occupy a position under a state, even though the employee has in the immediate or recent past advised, advocated or taught the violent overthrow of the federal and state governments established and guaranteed by the Constitution?

(c) If the Constitution of the United States creates and protects no such rights, is a state nevertheless forbidden by the Constitution from inquiring of its employees concerning such matters and compelled, if it seeks to discharge an employee who engages or has recently engaged in such activities, to charge and prove such acts by evidence obtained from persons other than the employee?

(It should be remembered that the case presented is not one where the petitioners' refusal to state the facts involved automatically effected their discharge—the proposed elicitation of statements from the petitioners amounted to no more than inquiries from them under oath, and their discharges were effected after hearings and upon determinations by the city's Civil Service Commission that the petitioners' refusals constituted causes for their discharges.)

(d) Whether or not the Constitution of the United States does create and protect a right to advise, advocate, or teach the violent overthrow of the federal and state governments established and guaranteed by the Constitution, and as well a right to organize and affiliate with others for such purposes, does it, in any event, create and protect a right in citizens of the

United States to occupy positions in the service of a state or its municipal corporations without complying with an inquiry, at legislative direction, as to the employee's affiliations with the Communist Party or the Communist Political Association, where the legislative determination is that such information is relevant to the employee's service and employment, and where there is not even an offer to show that such information is wholly irrelevant?

Statutes Involved.

The case below arose out of Sections 80 and 112(a) of the Los Angeles Charter (Appendix I, p. 1, and Appendix II, p. 1) and Sections 1-8 of the City's Ordinance No. 94,004 (Appendix III, p. 3) [R. 11-13].*

The ordinance is connected with, although it does not depend upon, Section 432 of the Charter of the City of Los Angeles (Stats. of California, 1941, p. 3409), which is set forth at length herein in our statement of the case, *infra*. (Since the enactment of this ordinance, the Legislature of the State of California has required that a similar oath be taken by all public employees [Chapter 8, Div. 4, Title 1, Government Code of California, Appendix IV, p. 6].)

The relevancy of the declarations required to be made in the oath provided in Section 1 of the Ordinance is supported by the California Syndicalism and Sabotage Law (Deering Act 8428, Stats. of California, 1919, p. 281; sustained in *Whitney v. California*, 274 U. S. 357, 71 L. Ed. 1095), by the California Subversive Organization

*Referred to hereafter as "the Ordinance."

Registration Law, first enacted in 1941 and now contained in the Corporations Code of California, Sections 35000 to 35302 (Stats. of California, 1947, Chapter 1038), by Section 1028 of the Government Code of California (Appendix V, p. 10), and by Section 616 of the Military and Veterans Code of California (Appendix VI, p. 11.) The California Syndicalism and Sabotage Law is set forth at length in Appendix VII at pages 11 to 13 and Sections 35000 to 35002, portions of Section 35100, Section 35103 and Section 35302 of the Corporations Code are supplied in Appendix VIII at pages 14 to 16. The relevancy of the requirements of the oath is also supported by the provisions of Sections 2381-2385 of Title 18 of the United States Code (Appendix IX, pp. 17, 18), and by the provisions of the Internal Security Act of 1950. (Ch. 1024—Public Law 831.)

Statement of the Case.

Prior to January 6, 1949, each of the petitioners had occupied a position in the classified service of the City of Los Angeles [R. 2]. The City of Los Angeles is a municipal corporation of the State of California, organized under a freeholders' charter (Stats. of Calif., 1925, p. 1028), pursuant to Section 8 of Article XI of the Constitution of the State of California.

Under the provisions of Sections 1-8 of Ordinance No. 94,004 [Appendix III, pp. 3-6; R. 11-13], each of the City's employees was required before January 6, 1949, to take and subscribe to an oath of allegiance to the United States and to the State of California, and to file an affidavit as to whether or not he was or had ever been a member of the Communist Party of the United States of America or of the Communist Political Association.

The oath of allegiance is in the usual form, and further includes definitive asseverations denying overt advocacies and affiliations inconsistent with the primary portion of the oath [R. 11, 12]. (*Cf. Dworken v. Collopy*, 91 N. E. 2d 564, 573; *Cohen v. Wright*, 22 Cal. 293, 310.) In addition to this undertaking of present allegiance, the oath includes a declaration as to the employee's conduct during the preceding five-year period. This portion of the oath was deemed to furnish additional security to the people of the City by seeking to insure that none of their employees had been engaged within that recent period in felonious conduct forbidden by the Smith Act (United States Code, Title 18, Section 2385; Appendix IX, p. 17) and by the California Syndicalism and Sabotage Law (Deering's General Laws, Act 8428; Statutes of California, 1919, p. 281; Appendix VII, p. 11), and was further indicated by the provisions of Section 432 of the Charter of the City of Los Angeles (Statutes of California, 1941, p. 3409). That charter section provides as follows:

> "Notwithstanding any other provision of this charter, no person shall hold or retain or be eligible for any public office or employment in the service of the City of Los Angeles, in any office or department thereof, either elective or appointive, who has within five (5) years prior to the effective date of this section advised, advocated or taught, or who may, after this section becomes effective [April 28, 1941], advise, advocate or teach, or who is now or has been within five (5) years prior to the effective date of this section, or who may, after this section becomes effective, become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said

period of five (5) years, advised, advocated or taught the overthrow by force or violence of the government of the United States of America or of the State of California. [Bracketed date supplied.]

"In so far as this section may be held by any court of competent jurisdiction not to be self-executing, the City Council is hereby given power and authority to adopt appropriate legislation for the purpose of effectuating the objects hereof."

Fifteen of the petitioners refused to sign either the oath or the affidavit; two of them, *Pacifico* and *Schwartz*, signed the oath but not the affidavit. Thereafter each of them was discharged for such cause by the general manager of his department [Charter of the City of Los Angeles, Sec. 80, Stats. of California, 1925, p. 1058, pertinent portions appear in the Appendix I, p. 1; R. 23].

Section 112(a) of the Charter of the City of Los Angeles (Stats. of California, 1945, page 3102, set forth at length in the Appendix II, p. 1) provides that an employee who has served his probationary period in the classified service of the City may be discharged only for a cause stated, that he is entitled upon his application to a hearing by the City's Board of Civil Service Commissioners as to the sufficiency and truth of such stated cause, and that the order of the Board after such hearing shall be final and conclusive.

Upon such application, the cause of the discharge of each petitioner was reviewed by the Board of Civil Service Commissioners in an open and public hearing. Each of the petitioners was present at his hearing, each was represented by counsel, and each was afforded every opportunity to present, and did present, evidence and

argument to the Commission [R. 5, 6, 25, 26]. After taking the matter under submission the Commission in each case entered its determination that the causes stated for the discharge were true, and that the causes stated were sufficient to sustain the discharge [R. 5, 6, 25, 26]

By their consolidated applications to the Superior Court of the State of California in and for the County of Los Angeles, the petitioners sought a writ of mandate compelling their reinstatement to the positions from which they had been discharged [R. 1-10]. This petition did not bring up the record before the Civil Service Commission, nor seek its review, but instead merely recited the facts here stated. Under California procedure (California Code of Civil Procedure, Sec. 1107) the respondents to such a petition may file their objections to the issuance of the alternative writ, and if it appears to the court therefrom that the writ should not issue, the court may refuse it (*Patterson v. Board of Supervisors of Los Angeles County*, 79 Cal. App. 2d 670, 180 P. 2d 945). The respondents here filed such objections [R. 28-32], and thereafter the court denied a writ [R. 32-33]. The effect of these proceedings and of this order under California law will be discussed hereafter.

The petitioners declined to amend their petition or to file any other proceedings, but instead took their appeal from the order described.

Since there was no answer or other pleading by the respondents in the proceeding in the Superior Court, and since there is otherwise none in the record, it cannot be said, as the petitioners claim, that there are any admissions or concessions of fact by the respondents. It is true that the allegations of fact (although not the statements of con-

clusions) in the petition, had to be taken by the Superior Court to be true except where such allegations of fact were otherwise contradicted by the record before it. But since that record, which consisted only of the petition for an alternative writ of mandate, included the ordinance and recited that hearings were held by the Civil Service Commission and that the Commission had sustained the petitioners' discharges, and since the Charter of the City is a statute of California and was therefore before the court, certain of the claims in the petition were contradicted by the provisions of the Charter, the intendments of the ordinance, the exhibits attached to the petition, and the intendments and presumptions attending the proceedings before and the determinations by the Civil Service Commission. Accordingly, contrary to certain allegations in the petition to the Superior Court, and contrary to assertions at various points in the petitioners' petition and brief, the record does not establish:

(a) That the Communist Party or the Communist Political Association is a political organization [R. 7, 8, 9, Pet. p. 16];

(b) That the petitioners were fit or suitable persons to fill the positions from which they were removed [R. 6]; or

(c) That the information sought to be elicited by the affidavits provided for in Section 4 of the ordinance [R. 12] was irrelevant to the positions held by the petitioners or to the petitioners' qualifications to hold those positions [Pet. p. 16].

On the contrary, for the purposes of the proceedings below and here, the record establishes the facts that:

(1) Neither the Communist Party nor the Communist Political Association is a political organization, but instead each of them is of such a character that membership in or affiliation with it is relevant to the City service and to the qualifications of employees of the City, and might establish the disqualification of the persons involved to remain in the City's service;

(2) The petitioners are not fit or suitable persons to fill the positions from which they were discharged. (Sec. 112(a) of the Charter of the City of Los Angeles, Appendix II, p. 1.)

Summary of Argument.

For the purposes of this proceeding the City of Los Angeles is the real respondent herein: the other respondents may be considered as being merely nominal parties The City of Los Angeles is a chartered municipal corporation of the State of California, deriving all of its powers from the people of California under the Constitution of the State of California and having exclusive power over its municipal affairs. Under California law questions concerning the employment and discharge of a city employee are municipal affairs (*Livingstone v. MacGillivary*, 1 Cal. 2d 546, 552, 36 P. 2d 622; *Pasadena v. Charleville*, 215 Cal. 384, 10 P. 2d 745; *Butterworth v. Boyd*, 12 Cal. 2d 140, 147, 82 P. 2d 434), and in such matters a chartered city exercises total power, subject only to any limitations contained in the Constitution of the State or the Constitution of the United States. Since only limitations fixed by the Constitution of the United States upon the

exercise of such power are open for discussion here, any problems presented are exactly those which would be presented had the governmental action here under attack been taken by the people of the State of California. The broad questions thus presented are whether or not the "rights" claimed by the petitioners are indeed established and secured to them by the Constitution of the United States and, if so, whether or not state action for the discharge of a public employee involves any deprivation of such rights. No questions of an exclusive oath provision under the state law or of distinctions between the duties of officers and those of employees are here presented, since those are exclusively state questions and since none of the petitioners is an officer.

The essence of the petitioners' claims is: *first*, that under the Constitution of the United States a citizen has a protected right to advise, advocate and teach the violent overthrow of the federal and state governments, and to organize and affiliate with others to effectuate such purposes, so long as he commits no other overt act to accomplish such purposes, and so long as there is not an undeniably clear and present danger of the early and successful accomplishment of such violent revolution; and *second*, that a discharge of a citizen employed by a state on the ground that he does so advise, advocate, teach or organize, or that he has done so in the recent past, deprives such citizen of the rights so guaranteed him by the Constitution of the United States.*

The respondent City of Los Angeles contends that there are no such rights under the Constitution of the United

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*As this brief goes to the printer we have not received printed copies of the petitioners' brief and thus cannot supply supporting page references for our statements about that brief.

States and in any event that questions of such kind, relating to the employment and discharge of public employees under laws of the State of California are reserved entirely to the state and that no question under the Constitution of the United States arises in that field.

The petitioners' subsidiary claims amount to this: that the state action here under attack compelled them to testify against themselves in violation of the Fifth and Fourteenth Amendments, and that it constituted a bill of attainder and an *ex post facto* law, in violation of Section 10 of Article I of the Constitution.

The reply of the respondent City to those contentions is that they are not supported by the facts of the case and in any event that they do not arise under the circumstances here presented, in a matter which concerns only the discharge of one employed under the authority of the state. The petitioners also complain that the oath provision of the ordinance is unnecessary, unwise and ineffectual, and that other means to the same purpose would be preferable. These questions are for the legislative body and in any event do not survive to this Court.[1]

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[1]The importance of maintaining the separation of powers contemplated by the Constitution is of the highest order. Since the courts are themselves the last arbiters of the limits of their own power, their care to restrict that power within the limits of the Constitution must be of the highest degree. *Fletcher v. Peck*, 6 Cranch 87, 128 (3 L. Ed. 162, 175); *Union Pacific Railroad Co. v. United States*, 99 U. S. 700 (25 L. Ed. 496); Concurring opinion of Mr. Justice Frankfurter, *American Communications Association v. Douds*, 339 U. S. 382, 416 (94 L. Ed. 925, 953). *McCray v. U. S.*, 195 U. S. 27 (49 L. Ed. 78), where the Court said, at pages 53-56:

> "Whilst, as a result of our written Constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore, in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded

The respondent City further contends that the judgment below rests in any event on purely state grounds: that there was a misjoinder and defective pleading under California law, that the decision of the Civil Service Commission was final and conclusive under state law and that the judgment of the Superior Court properly rests upon those grounds without reference to any constitutional questions which might otherwise have been involved.

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from the foundation of the government where an act which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular assertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that, in our constitutional system, the judiciary was not only charged with the duty of upholding the Constitution, but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial, and executive departments of the government upon which our system is founded, and would be a mere act of judicial usurpation.

". . . this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department.

". . . While abuse of a power conferred may be temporarily effectual, as where the Congress may use its power unwisely or injuriously, . . . '(t)he wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.' "

And as the Court said in *RD-DR Corporation v. Smith*, 183 F. 2d 562, 565, 566 [Certiorari denied 340 U. S. 853 (95 L. Ed. 40)]:

" 'No matter how desirable the results might be, it is of the essence of our system that the judges must stay within the bounds of their constitutional power. Nothing is more fundamental—even the Bill of Rights. To depart from this fundamental is . . . "to frustrate the great design of a written Constitution." ' "

ARGUMENT.

POINT I.

When the Petitioners' Essential Contentions Are Analyzed and Accurately Stated They Are Seen to Be Entirely Invalid and to Fail to Raise Even a Doubtful Question Under the Constitution.

The petitioners' essential argument in the court below and before this Court is that the First Amendment to the Constitution of the United States compels the employment of employees by the states or their governmental entities without inquiry or other appropriate action to insure that such employees are not working for the forcible overthrow of the federal and state governments. The First Amendment, the petitioners say, in effect, protects advocacy of the destruction of the United States, and entirely immunizes those who organize and work for the destruction of the United States against any governmental action, until such advocacy and organization have proceeded so far and with such success that the conspiratorial movement constitutes a clear and present danger—a clear and present danger of immediate and probably successful revolution—a clear and present threat of the immediate destruction by force and violence of the existing constitutional government of the United States. Indeed the petitioners say, in effect, such protection extends even further, to the point where, under the Constitution, the people of the United States—and of California—can do nothing to prevent the progress of such a revolutionary movement until overt physical acts toward revolution are actually committed. And until such a clear and present danger threatens and until such overt acts occur, the petitioners say, the people must, without any question whatever, employ the adherents of revolution as the people's own

agents in the conduct of the people's existing constitutional government.

These contentions naturally find as little support in the Constitution or in the case law as they do in reason. The Constitution itself guarantees to the states a republican form of government (Article IV, Sec. 4). The contemporaneous meaning and purpose of this provision was expressed by Alexander Hamilton in the Federalist, No. XXI. He said there:

> "The inordinate pride of state importance has suggested to some minds an objection to the principle of a guaranty in the federal government, as involving an officious interference in the domestic concerns of the members. A scruple of this kind would deprive us of one of the principal advantages to be expected from union, and can only flow from a misapprehension of the nature of the provision itself. It could be no impediment to reforms of the state constitutions by a majority of the people in a legal and peaceful mode. This right would remain undiminished. The guaranty could only operate against changes to be effected by violence. Towards the prevention of calamities of this kind, too many checks cannot be provided. The peace of society and the stability of government depend absolutely on the efficacy of the precautions adopted on this head. Where the whole power of the government is in the hands of the people, there is the less pretense for the use of violent remedies, in partial or occasional distempers of the state. The natural cure of an ill administration, in a popular or representative constitution, is a change of men. A guaranty by the national authority would be as much leveled against the usurpations of rulers as against the ferments and outrages of faction and sedition in the community."

And since it was adopted, the First Amendment has never been held to protect either speech or activity directed at the forcible overthrow of the very government which was established by the Constitution or at the overthrow of the governments of the states which are permanently protected by that Constitution; indeed, the decisions cited by the petitioners uniformly negate their essential contention.

As the court said in *Barsky v. United States*, 167 F. 2d 241, 246 (certiorari denied, 334 U. S. 843, 92 L. Ed. 1767), officers of the government established under the Constitution have not only the power but the obligation to inquire into potential threats to the government, not only for the traditional reason that a government must protect itself, but for the basic reason that since government in this country was "established by the people as an instrumentality for the protection of the rights of (the) people, it has an obligation to its creators to preserve itself. * * *." (See also, *United States v. Josepheson*, 165 F. 2d 82 (certiorari denied, 333 U. S. 838, 92 L. Ed. 1122).)

Our argument in the main then, will be directed toward the petitioners' first essential contention, which is argued in their Point II. Their argument seeks to present the case as if other questions were involved than those we have stated and as if this were the time and the case for the court to compose detailed regulations to insure that all governmental action hereafter shall be restrained within First Amendment limitations. We shall not, however, as the petitioners invite us to do, undertake a minute examination of the limitations which might exist for the preservation of First Amendment liberties, in other cases and upon other facts, upon action by the people designed to prevent the violent overthrow of their constitutionally established

government. There is no necessity here for sighting precise boundaries, since the public action challenged here is close to the very center of the sphere of obviously justifiable action by the people in their own defense.

Statement of Premises—The Bases of Democratic Government.

The argument presented by the petitioners in their brief is so ingeniously circuitous and is based upon such unwarranted and bland assumptions and half truths that we are encouraged to begin our argument by a few references to the basic principles of government in this country.

Our discussion of our assumptions may be attacked as stating only the trite, the obvious, and the ideal. We will not resent such an attack, for truth and reason are trite and often obvious, and all too often overlooked in a welter of words which blow about and depart by the same door through which they entered.

The Government of the United States *Is* the People of the United States.

In the United States of America government is both a concept and an entity and it is immaterial for our purposes whether it is considered as the one or the other. As entities, the governments of the United States and of the states derive all of their powers from their respective peoples. They are the agents of their peoples, the mechanisms which the people have chosen to administer their political affairs, and consequently, the government of the United States *is* the people of the United States, and the government of the State of California *is* the people of California. The structure and the mechanics of govern-

ment, its several branches, and departments *are* the people, acting through the individuals selected by the people.[2]

We have chosen as instruments written constitutions which provide for the departmentalized structures of our government, and either for a limited grant of power to such government, as in the case of the Federal Government, or for limitations on general powers, in the case of the states. Because of such limitations as are contained in the Bills of Rights sections of the constitutions of the states even the majority of the people, acting through the agency of the servants of all the people, may not interfere at all in certain affairs of any of the people and may otherwise interfere only according to prescribed procedures. Similar limitations on the powers of state governments exist by virtue of Article I, Section 10, and Article IV, Section 4, of the Constitution of the United States, and by reason of the Fourteenth Amendment, which also to an extent imposes some of the limitations of the first eight Amendments upon the states, although originally their provisions were applicable only to the Federal Government (*Everson v. Board of Education*, 330 U. S. 1 [91 L. Ed. 711]). These denials of power to the United States and to the states, which we call our Bills of Rights, are the constitutional provisions under which the petitioners seek to take cover. Determination of the adequacy of those provisions to provide such protection to the petitioners must derive from a consideration of the purposes of those constitutional guaranties as well as of the other fundamental bases of our government.

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[2]So, in our argument, and in most instances in that of the petitioners', "government," "the United States" and "the government of the United States" should be read as shorthand for "the people of the United States, through their chosen agents," and "state," "the State of California," and "the City" should be read as shorthand for "the people of California, through their chosen agents."

Ultimate Power Is Constitutionally in the People

Perhaps the most complete and certainly an adequate justification for the democratic system which we have erected in the United States is that it provides a mechanism whereby changes desired by the people, whether they be advances or retreats, may be effected without revolution or bloodshed. It is implicit in such a concept that no change may ever be irrevocable, that the people may always turn back or turn aside, that shifting desires may shift decisions, that nothing can long continue without the approbation of most of the people, and that no change or reform, whether it be harmful or beneficial, may be accomplished unless the majority of the people approve. Such a concept is completely incompatible with any philosophy of revolution or forcible change, for if the people want the proposed change, revolution and force are unnecessary. On the other hand, no matter what the benefits of the proposed change, it may not be accomplished through force by a minority because the minority party would then have to assume and maintain control in order to preserve its reforms, and the democratic system would so be not only denied but destroyed. Thus, the American people have accepted the teachings of history that no government can be right unless it rests upon the consent of the people it governs, that there is no such thing as a perpetual benevolent despotism, that force will finally overthrow a government established by force against the wishes of the people, and that enduring government is conceived in peace and supported by the popular mandate.

So the reasons for a democratic system of government become at once its definition: it is that system which expresses, accomplishes, and preserves the will of the people, periodically expressed, directly or by representative elections, through a free and universal suffrage.

The People Cannot Surrender Their Power.

The preservation of the democratic system is thus one of the inescapably necessary objects of a democratic government and becomes the prime duty of such a government. This duty of a democratic government not only to preserve itself as a governmental entity, but to preserve, protect, and maintain itself as an embodiment and instrument of the democratic concept goes far beyond the historical idea that the first duty of any government is to maintain itself. The English government has essentially maintained itself as an entity for hundreds of years, but it has done so by such concessions and adaptations as would make the present system of a supreme House of Commons, democratically elected, quite unrecognizable to any English monarch of an earlier period.[3] Czarist Russia might also have maintained itself as a governmental entity and hereditary monarchy if similar concessions and adaptations had been made, resulting in final recognition by the Czars of the essential right and power of the people to govern themselves. Because of the changes wrought in England, the English crown endures. Because the Czar insisted upon maintaining his philosophy as well as his crown, he lost both, and condemned his people to further prolonged agonies before they shall finally find liberty and peace.

But a democracy, as we and other nations know it, cannot survive by renouncing its power and right. If it is to recognize any right in a minority to take control, it must at the same time deny the right of the majority to

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[3]Of course, most of those concessions were compelled by force, since the people of England were without other means to obtain them, but since even before the supremacy of the Commons was established, the use of force to establish the people's will had become unnecessary.

retain control. No such fundamental revolution can be a means to the self-preservation of a democracy; instead it can result only in its self-destruction. The struggles and revolutions of the past which have been fired by man's loftiest aspirations for freedom and liberty have been directed toward the final establishment of government through the will of the people. We have that now, imperfect perhaps in mechanics and details, but still fundamentally we have it. If there be obstacles now to the accomplishment of the people's will, they may be removed by the people in an orderly way within the machinery of the government which the people have established. If anything is now being done without the approval of the people they periodically have an opportunity to express their disapproval and to unseat such of their servants as have misinterpreted their desires.[4]

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[4] *Cf.* argument of Daniel Webster in *Luther v. Borden*, 7 How. 1 (12 L. Ed. 581), related by this Court with approval in *In re Duncan*, 139 U. S. 449, 461 (35 L. Ed. 219, 224), and in *Taylor v. Beckham*, 178 U. S. 548, 579 (44 L. Ed. 1187, 1201):

> "Mr. Webster's argument in that case took a wider sweep, and contained a masterly statement of the American system of government as recognizing that the people are the source of all political power, but that, as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people; that the basis of representation is suffrage; that the right of suffrage must be protected and its exercise prescribed by previous law, and the results ascertained by some certain rule; that through its regulated exercise each man's power tells in the Constitution of the government and in the enactment of laws; that the people limit themselves in regard to the qualifications of electors and the qualifications of the elected, and to certain forms for the conduct of elections; that our liberty is the liberty secured by the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes; and that the Constitution and laws do not proceed on the ground of revolution or any right of revolution, but on the idea of results achieved by orderly action under the authority of existing governments, proceedings outside of which are not contemplated by our institutions."

Revolution Is Not Political Activity.

This registration of the people's will through which changes are effected or public servants are selected or unseated is accomplished by means of what is sometimes called the political process. The word "political" is defined in Merriam Webster Dictionary as, "Of or pertaining to the exercise of the rights and privileges or the influence by which the individuals of a state seek to determine or control its public policy; having to do with the organization or action of individuals, parties, or interests that seek to control the appointment or action of those who manage the affairs of state." The same authority defines "politics" as "The science and art of government; the science dealing with the organization, regulation, and administration of a state, in both its internal and external affairs; political science . . . . The theory or practice of managing or directing the affairs of public policy or of political parties; hence, political affairs, principles, convictions, opinions, sympathies, or the like . . ." Advocacy of the overthrow of the government by force or violence is not an activity which can be characterized as "political." "On the contrary," asserted the Supreme Court of California in *Lockheed Aircraft Corporation v. Superior Court,* 28 Cal. 2d 481, 485, 171 P. 2d 21, "the words 'politics' and 'political' imply orderly conduct of government, not revolution." Hence, a statute prohibiting interference by employers with political activities or affiliations of employees affords no protection to an employee advocating the overthrow of the government by force or affiliating with a group or organization advocating such overthrow (*supra*). A political party in the United States, therefore, is an organization which is formed and which exists as a device for carrying on political activities in the

manner above defined, and an organization which seeks to accomplish the forcible overthrow of government does not, by calling itself a political party, become such.

Constitutional Rights Are Established for the Preservation of the Democratic System.

Some of our constitutional provisions establish structural devices which are deemed fundamental and essential to the democratic system—universal suffrage, the independent judiciary and periodic elections. Other provisions which take the form in the United States of constitutional limitations upon the authority of even the majority of the people are deemed similarly fundamental and essential—freedom of speech and of the press, separation of church and state, the right to assemble and petition. These rights are inseparable from the American democratic concept. The people cannot govern unless they are informed, nor unless they can express themselves, nor if loyalty to a church is to be confused with loyalty to the country. These rights cannot be struck down without at the same time striking down democracy itself. Thus they stand more firmly and unalterably as constitutional rights than do other provisions of nominally equal stature.

At the same time their origin and essential reason for being must be recognized if they are to be interpreted and administered as enduring rights. Free speech means freedom to criticize, freedom to express even palpably erroneous opinion, freedom to proselyte even for abhorrent causes, but it cannot mean freedom to advise, to advocate or to conspire for the destruction of democratic government itself.

As the court said in *People v. Cox*, 66 Cal. App. 287, 290, 226 Pac. 14, 15, with respect to the claim that the First Amendment protects the advocacy of revolution:

> "Free speech and licence are not convertible terms. One may freely state his reasons why a change of government is desirable, but he has no license by reason thereof to advocate the destruction of or to take steps to incite others to destroy the property or imperil the lives of those who do not agree to such changes. One method is lawful, the other is not, because it strikes at the basis of all government and denies the right of self-preservation. This does not presuppose the continuance of the existing order, but it does presuppose that the existing order, condition, and structure of society shall be changed only by peaceable means and that violence and destruction have no place in human government."[5]

Yet, it is upon the proposition that the First Amendment protects the advocacy of violent revolution that the petitioners must rest their case. In the District Court of Appeal they frankly said, "The crux of the matter here is whether the idea of forcible overthrow of government may be proscribed by government." (App. Op. Br. p. 24). Even this frank statement does not clearly and precisely define the issue, for it confuses transitive advocacy with intransitive cogitation or belief: what the petitioners really are saying is that "the crux of the matter here is whether the advocacy of the forcible overthrow of the existing government of the United States must be protected by that government and by California as an established right under the First Amendment, even

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[5] *Cf. People v. Lloyd*, 394 Ill. 23, 136 N. E. 505, 513.

as against efforts of the people of the City of Los Angeles to bar adherents of revolution from their employ."

We accept and welcome the petitioners' challenge and deny that there is or can be a "right" to advocate the forcible overthrow of the government of the United States, and we propose to rest our argument in the main upon that issue.

POINT II.

The Decisions of This Court Establish the Proposition That the Constitution Does Not Create or Protect Any Claimed Right to Advise, Advocate or Teach the Forcible Overthrow of the Governments of the United States or of the Several States.

The petitioners' essential argument here amounts to this:

It is an inherent natural right that a few who conceive that they know better than the people what is good for the people may by force overthrow the government of the United States and substitute another which will promote the general welfare as those few see it. Consequently, and *a fortiori*, one may advocate the overthrow of the government of the United States by force and violence.

The decisions of this Court directly reject such claims. In *Schenck v. United States*, 249 U. S. 47 (63 L. Ed. 470), this Court, speaking through Mr. Justice Holmes, approved the imposition of criminal sanctions on the accused, not for the larger offense of overt advocacy of forcible revolution, but for the lesser offense of advocating disobedience and obstruction of the draft, and in *Frohwerk v. United States*, 249 U. S. 204 (63 L. Ed. 561), *Debs v. United States*, 249 U. S. 211 (63 L. Ed. 566), *Abrams*

v. United States, 250 U. S. 616 (63 L. Ed. 1173), and *Schaefer v. United States*, 251 U. S. 466 (64 L. Ed. 360), similar conclusions were reached.

Gitlow v. New York, 268 U. S. 652, 669 (69 L. Ed. 1138, 1147), directly presented the problem of whether or not penal sanctions might be imposed upon one who advocated the violent destruction of organized parliamentary government. This Court sustained the conviction, saying:

> "That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the state. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial because the effect of a given utterance cannot be accurately foreseen. . . . A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration."

And this Court also there pointed out that "advocacy" is not mere thought or belief, but that it constitutes active espousal.

Gitlow has not been disapproved in any subsequent opinion of this Court.

In *Whitney v. California*, 274 U. S. 357, 371 (71 L. Ed. 1095, 1105), a similar conclusion was reached and this Court also pointed out with respect to the advocacy of violent revolution by an organization, that such "united and joint action involves even greater danger to the public peace and welfare than the isolated utterances and acts of individuals . . ."

As against the contentions that the Constitution provides immunity against punishment for such activity unless clear and present danger appears, *Gitlow* and *Whitney* established the propositions *first*, that there is no such immunity in any event, and *second*, that clear and present danger was established by the intendments of the penal legislation involved in those cases.

In *Stromberg v. California*, 283 U. S. 359, 368, 369 (75 L. Ed. 1117, 1123), the conviction was reversed because of the vagueness of part of the statute, and because the jury's single verdict might have been based upon its finding on that part of the statute alone. This Court said, however:

> "There is no question but that the state may thus provide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means. There is no constitutional immunity for such conduct abhorrent to our institutions,"

citing *Gitlow* and *Whitney*.

And in *Near v. Minnesota*, 283 U. S. 697, 716 (75 L. Ed. 1357, 1367), the question presented was the validity of previous restraints upon the publication of malicious, scandalous and defamatory periodicals. This Court held that the use of the injunctive process in such cases violates the First Amendment, but pointed out that the First Amendment does not forbid all previous restraints upon publication and that the injunctive process may be used to

prevent publications inciting to acts of violence and the overthrow by force or orderly government, since—

> "The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not 'protect a man from an injunction against uttering words that may have all the effect of force'."

As the Court said in *United States v. Dennis,* 183 F. 2d 201, at page 213:

> "The advocacy of violence may, or may not, fail; but in neither case can there be any 'right' to use it. Revolutions are often 'right,' but a 'right of revolution' is a contradiction in terms, for a society which acknowledged it could not stop at tolerating conspiracies to overthrow it, but must include their execution."

And as Judge Chase said in his concurring opinion (pp. 236-7):

> "The only answer to the rule of the Gitlow case is, I believe, that individuals have a constitutional right to revolt. Of this, the Constitution contains its own refutation. The preamble; Article 1, Sec. 8; Article III, Sec. 3; Article IV, Sec. 4. History confirms this also. One need only to refer to the so-called 'Whiskey Rebellion' and the secession of the Confederate States."[6]

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[6]See also the concurring and dissenting opinion of Mr. Justice Jackson in *American Communications Association v. Douds,* 339 U. S. 382, 422-445 (94 L. Ed. 925, 956-968), and especially footnotes 5, 12 and 13.

POINT III.

The Petitioners' Discharge for Their Refusal as Employees Under the State to Obey the Legislative Directive Here Involved Violated No Liberties Secured by the Constitution and Was Not Forbidden Thereby.

Since the First Amendment does not establish or protect the rights or immunity claimed by the petitioners, their discharge was not affected by the Constitution of the United States, and consequently any questions arising therefrom were purely state questions. In view of this Court's consistent determination to draw its decisions upon constitutional questions as narrowly as possible, and to draw them only in the context of the particular case before the court (*Sweatt v. Painter*, 339 U. S. 629 (94 L. Ed. 1114)), it becomes appropriate now to consider the narrower question here presented: whether or not a state is forbidden by any provision of the Federal Constitution to ask of its employees such undertakings as were asked here and to discharge such employees as refuse to comply.

The problem must be reviewed in the light of the principle stated by this Court in *Kotch v. River Port Pilot Commissioners*, 330 U. S. 552 (91 L. Ed. 1093), that an important factor in such a case is that it tests the right and power of a state to select its own agents and officers.

As this Court said in *Taylor v. Beckham*, 178 U. S. 548 at 570-571 (44 L. Ed. 1187, 1198), with respect to the claims of the plaintiffs in error that their ouster from elective state offices raised questions under the Constitution:

> "It is obviously essential to the independence of the states, and to their peace and tranquility, that their power to prescribe the qualifications of their own

officers, the tenure of their offices, the manner of their election, and the grounds on which, the tribunals before which, and the mode in which, such elections may be contested, should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States.

"And where controversies over the election of state officers have reached the state courts in the manner provided by, and been there determined in accordance with, the state Constitutions and laws, the cases must necessarily be rare in which the interference of this court can properly be invoked."

(Other language of this Court in *Taylor v. Beckham*, 178 U. S. 548 at 578 (44 L. Ed. 1187, 1201), disposes of the petitioners' obscure contention here that the state action under attack violates Article IV, Sec. 4, of the Constitution: "It was long ago settled that the enforcement of this guaranty belonged to the political department.")

And in *Wilson v, North Carolina*, 169 U. S. 586 (42 L. Ed. 865), which concerned the Governor's suspension of a state officer, this Court said:

"What kind and how much of a hearing the officer should have before suspension by the governor was a matter for the state legislature to determine, having regard to the Constitution of the state. The procedure provided by a valid state law for the purpose of changing the incumbent of a state office will not, in general, involve any question for review by this court. A law of that kind does but provide for the carrying out and enforcement of the policy of the state with reference to its political and internal administration, and a decision of the state court in regard to its construction and validity will generally

be conclusive here. The facts would have to be most rare and exceptional which would give rise, in a case of this nature, to a Federal question . . . . In its internal administration the state (so far as concerns the Federal government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the persons filling the office. And in such matters the decision of the state court, that the procedure by which an officer has been suspended or removed from office was regular and was under a constitutional and valid statute, must generally be conclusive in this court. . . . Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law, or by denying him the equal protection of the laws."

Similar conclusions were reached by this Court in *Snowden v. Hughes*, 321 U. S. 1 (88 L. Ed. 497, 505), where it was further said (page 12):

"And it is not without significance that we are not cited to and have been unable to find a single instance in which this Court has entertained the notion that an unlawful denial by state authority of the right to state office is without more a denial of any right secured by the Fourteenth Amendment."

The specific problem presented here must also be considered in conjunction with the following well-established principles:

(1) This Court Will Not Strike Down State Action Unless Such Exercise of Authority by the People of the State Is Clearly Forbidden by the Constitution.

Bute v. Illinois, 333 U. S. 640, 653 (92 L. Ed. 988, 993);

Whitney v. California, 274 U. S. 357 (71 L. Ed. 1095);

Mugler v. Kansas, 123 U. S. 623, 661 (31 L. Ed. 205);

Graves v. Minnesota, 272 U. S. 425, 428 (71 L. Ed. 331).

It has been suggested that the principle: that the statute "comes encased in the armor wrought by prior legislative determination" does not apply where state action impinges upon First Amendment liberties.[7]

We respectfully urge that the nature of the case offers no reason for the abandonment of this principle: that the question is always the same—does the Constitution forbid the state action involved. To say that the state action will not stand where it impinges upon First Amendment liberties is simply to answer the very question at issue, for if the state action does impinge upon First Amendment liberties, it is forbidden by the Constitution, or if it is lawful action, then it does not restrict any constitutional liberty.

As we see it, there can be no such thing as a lawful restriction of any constitutional right, no such thing as an

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[7] *Bridges v. California,* 314 U. S. 252, 261 (86 L. Ed. 192, 202); *Thomas v. Collins,* 323 U. S. 516, 529, 530 (89 L. Ed. 430). But see *American Communications Association v. Douds,* 339 U. S. 382 (94 L. Ed. 925), and the opinion of Mr. Justice Frankfurter concurring, in *Kovacs v. Cooper,* 336 U. S. 77 (93 L. Ed. 513).

infringement of constitutional liberties, no such thing as a limitation upon the exercise of constitutional liberties. Constitutional rights are not absolute or definable, but it does not follow that they are either expansible or limitable. The question is sometimes to determine whether particular action by the citizen, under the particular circumstances presented, constitutes an exercise by the citizen of some constitutional right—if it does, the state may not prevent such action by previous restraint, nor punish the exercise of such right by penal action. In other cases the question is not precisely whether or not the citizen has a constitutional right to do the thing in question, but rather whether or not particular state action concerning it is forbidden by the Constitution.

Thus, it would be a contradiction in terms to say that the Constitution created and protected a right in Near (*Near v. Minn.*, 283 U. S. 697 (75 L. Ed. 1357)), to publish a scandalous and defamatory newspaper: rather the Constitution requires an immunity in such matters against previous restraint by the state, but leaves the state free to punish the act after its commission. In our view it is inaccurate in such a case to say that the scandalmonger has abused his right of free speech; there is no *right* to publish obscene or libelous matter, but in order to protect the exercise of genuine rights of free speech, the Constitution stays the hand of the state in such cases until after the offense is committed.

So also it is not precisely true that Terminiello (*Terminiello v. Chicago*, 337 U. S. 1 (93 L. Ed. 1131), was exercising any constitutional right when he incited one group to immediate violence against another. Rather, under this Court's decision there, he was clothed with an immunity against the imposition of sanction for his

utterance, since any violence threatened was local and limited, since his speech was not directed toward the forcible overthrow of the existing constitutional government, and since it was not otherwise made to appear that his utterances created a clear and present danger of substantial evils.[8]

(2) Legislation Comes to This Court "Encased in the Armor Wrought by Prior Legislative Determination." All Possible Intendments Support the Legislation and in Its Support It Will Be Presumed That the Legislature Found the Existence of Any and Every Fact Which Might Be Necessary to Exist in Order to Support the Necessity and Propriety of the Statute.

Graves v. Minnesota, 272 U. S. 425, 428 (71 L. Ed. 331, 335);

Carolene Products Company v. United States, 323 U. S. 18 (89 L. Ed. 15);

Mugler v. Kansas, 123 U. S. 623, 661 (31 L. Ed. 205, 210);

O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S. 251, 257 (75 L. Ed. 324, 327).[9]

This does not mean, of course, that these presumptions as to facts are forever binding or that they may not be disputed or disproved by proper attack, nor that in subsequent applications of the statute persons concerned may not dispute or disprove them, but it does mean that the burden in the case before this Court was upon the peti-

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[8]*Cf. American Communications Association v. Douds,* 339 U. S. 382 (94 L. Ed. 925).

tioners to prove before the Civil Service Commission such facts as would have negated those presumptions.

(3) This Court Is Not Concerned With the Wisdom of the Legislation Before It, and May Not Substitute Its Judgment for That of the Legislature.

American Communications Association v. Douds, 339 U. S. 382, 400-1 (94 L. Ed. 925);

U. S. v. Carolene Products Co., 304 U. S. 144, 154 (82 L. Ed. 1234);

Broadwax v. Missouri, 219 U. S. 285 (55 L. Ed. 219);

L'Hote v. New Orleans, 177 U. S. 587 (44 L. Ed. 899);

11 Am. Jur. 804, Constitutional Law, Sec. 138, U. S. Supreme Court cases collected in Note 10.

(4) There Is No Property Right in Public Employment; a Public Employe Has No Proprietary Interest in His Position and the Requirements of Due Process Therefore Have No Application in a Controversy Between a State and Its Employees Which Arises Solely Out of Such Statutory Employment Relationship.

There can be no valid contention either that the petitioners have been deprived of any property right without due process of law, in violation of the Fourteenth Amendment,

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[9] "As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the Legislature and of the highest court of the state indicates that such evils did exist. The record is barren of any allegation of fact tending to show unreasonableness." (Brandeis, J., at pp. 257-8.)

or that there has been any impairment of contract rights within the meaning of the contract clause (Article I, Section 10).

The courts of California have uniformly held that there is no property right in public employment. In *Risley v. Board of Civil Service Commissioners*, 60 Cal. App. 2d 32 (140 P. 2d 167), which involved the very provisions of the Charter of the City of Los Angeles under which the petitioners were employed, the court made the following statement (at page 37) in response to the argument that the plaintiffs' vested rights in their employment were infringed by a Charter amendment:

> "That they have rights, by virtue of the provisions of the Charter, which the courts will protect against unauthorized infringement by the City or any of its legislative or executive officers or boards, is undoubtedly true * * * But that these rights are vested, contractual rights, protected by the state and federal constitutional provisions forbidding the impairment of contracts and the taking of 'property' without due process, so that they cannot be changed, is not true. The rights to which plaintiffs would cling are created by or under the provisions of the Charter and are dependent upon those provisions. They may all be lost by the repeal of the provisions or modified by an amendment to the provisions, at the will of those who determine what the Charter's terms shall be."

And in *Boyd v. Pendegast*; 57 Cal. App. 504 (207 Pac. 713), which arose under similar provisions of an earlier Charter of the City of Los Angeles, the court said at pages 506-507:

> "The possession of an office, or of employment with the government, or under any of its agencies, does not

> confer a vested property right of any quality whatsoever . . . In general, then, it follows necessarily that under whatever procedure is adopted to work the removal of a person from office, the constitutional question as to lack of due process of law, cannot be involved."[10]

Although this court is not necessarily bound by the decision of a state court as to whether or not a state statute creates contract or property rights which are entitled to protection under the Constitution, nevertheless this court accepts the state courts' construction unless it is palpably erroneous. (*Phelps v. Board of Education*, 300 U. S. 319, 322 (81 L. Ed. 674, 677).)

And in a number of decisions involving state offices or positions this Court has held that there is no property right in a public position (*e. g., Taylor v. Beckham*, 178 U. S. 548 (44 L. Ed. 1187), and *Ex parte Sawyer*, 124 U. S. 200 (31 L. Ed. 402)) and that there is no contract right in such matters within the protection of the contract clause. (*e. g., Dodge v. Board of Education*, 302 U. S. 74 (82 L. Ed. 57); *Phelps v. Board of Education*, *supra*, 300 U. S. 319 (81 L. Ed. 674); *Butler v. Pa.*, 10 How. 402 (13 L. Ed. 472).)[11]

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[10]See also: *Butterworth v. Boyd*, 12 Cal. 2d 140, 150 (82 P. 2d 434); *In re Matter of Carter*, 141 Cal. 316, 319 (74 Pac. 997); *Boutwell v. State Board of Equalization*, 94 Cal. App. 2d 945 (212 P. 2d 220); *Nider v. City Commission*, 36 Cal. App. 2d 14, 30 (97 P. 2d 293); *Ludolph v. Board of Police Commissioners*, 30 Cal. App. 2d 211, 216 (86 P. 2d 118); *French v. Senate*, 146 Cal. 604 (80 Pac. 1031).

[11]See, for similar holdings as to federal positions: *United Public Workers v. Mitchell*, 330 U. S. 75 (91 L. Ed. 754); *Bailey v. Richardson*, 182 F. 2d 466; *Carter v. Forrestal*, 175 F. 2d 364.

(5) In Matters Involving the Exercise of Executive Discretion in Administrative Affairs of Government, as in the Field of Personnel Administration, the Courts Will Not Interfere, Particularly When a Statute Declares an Administrative Determination to Be Final and Conclusive.

This Court has long recognized that in matters involving the internal administration of the executive branch of the government the determinations of an administrative officer or board in the exercise of his or its discretion should be immune from judicial control except where the constitution or a statute otherwise expressly provides. (*Decatur v. Paulding*, 14 Pet. 497, 516 (10 L. Ed. 559, 568).) This is true even where executive duties "require an interpretation of the law." (*United States ex rel Dunlap v. Black*, 128 U. S. 40, 48 (32 L. Ed. 354, 357); *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 127, 128, 131, 132 (84 L. Ed. 1108, 1115, 1117).)

In numerous cases involving the discharge of public employees for cause this Court and other courts have held that the administrative determination by the employing agency of what constitutes cause for removal will not be judicially reviewed. (*Eberlein v. United States*, 257 U. S. 82 (66 L. Ed. 140); *Keim v. United States*, 177 U. S. 290 (44 L. Ed. 774); *Carter v. Forrestal*, 175 F. 2d 364 (certiorari denied in 338 U. S. 832, 94 L. Ed. 507); *Levine v. Farley*, 107 F. 2d 186 (certiorari denied in 308 U. S. 622, 84 L. Ed. 519); *Souder v. Philadelphia*, 305 Pa. 1 (156 Atl. 245, 77 A. L. R. 610); *State ex rel Beebe v. City of Seattle*, 159 Wash. 392 (293 Pac. 459).)

In *Bailey v. Richardson*, 182 F. 2d 46, at page 62 (cert. granted 339 U. S. 977, 94 L. Ed. 1382), the court observed that the judiciary cannot assume responsibility for the sufficiency of the qualifications of executive employees

without assuming corresponding responsibility for the conduct of executive affairs. "It is inescapable," the Court said, "from the Constitution's separation of powers that the qualification and disqualification of executive employees is for executive determination." And in *Friedman v. Schwellenbach,* 159 F. 2d 22 (certiorari denied in 330 U. S. 838, 91 L. Ed. 1285), the same conclusion was reached, the Court noting at page 25 that more than one hundred years ago the Supreme Court in *Decatur v. Paulding*, 14 Pet. 497 (10 L. Ed. 559), had said that for the courts to interfere with the performance of the ordinary duties of the executive department of the government "would be productive of nothing but mischief."

The petitioners in this case were discharged for cause under the provisions of Section 112(a) of the Charter of the City of Los Angeles (Appendix II, p. 1), which requires the Civil Service Commission, upon the timely request of a discharged employee, to review the grounds for his removal and which specifically makes the order of the Commission with respect to such removal "final and conclusive." The courts of California have several times had occasion to determine the effect of this charter language, as well as provisions in the charters of other cities of the state making such orders final and conclusive. For example, in *Boyd v. Pendegast,* 57 Cal. App. 504, 507 (207 Pac. 713), the court said, with respect to judicial review under a section of the Los Angeles Charter identical with present Section 112(a):

> "Whether for cause or without cause, where the removal of an officer is accomplished after full compliance with existing regulations affecting the matter, no ground is left upon which to found any action against the removing power."

And in *McGinn v. Board of Health*, 113 Cal. App. 228, 231 (298 Pac. 118), the court, after noting that the appellant, a discharged employee of the City of San Francisco, had taken an appeal to the Civil Service Commission under a charter section which provided that the order of the Commission should be final, stated:

> ". . . Under the above provision of the charter, where the procedure outlined has been substantially followed, such decision is final regardless of any defect or deficiency in the evidence and is placed beyond review by the courts."

The New York Court of Appeals, in *Levitch v. Board of Education*, 243 N. Y. 373 (153 N. E. 495), likewise ruled that a discharged teacher was barred from resorting to the courts where she had appealed to the Commissioner of Education under Section 890 of the Education Law, which provided that his decision should be final and conclusive. This meant not only that his action was not reviewable in court on the facts, but also that it could not be reviewed for alleged errors in law. Referring to the Commissioner's jurisdiction the court said:

> ". . . The fact that the question may have involved the construction or application of a statute did not deprive him of jurisdiction. *Barringer v. Powell*, 230 N. Y. 37, 128 N. E. 910."

The application of the two principles last stated to such a case as this may be otherwise expressed in the idea that the courts have no jurisdiction by mandamus to compel the reinstatement of an employee unless there is a clear statutory right to the position.

Thus, since here the city is under no plain statutory duty, nor any duty to employ persons whose discharges from the City's service have been sustained by the City's Civil Service Commission, under the same statute which governed their employment and provided for their retention, the trial court properly denied even an alternative writ of mandate.

Our further discussion of the narrow question presented, in the light of the foregoing principles, separates itself into considerations of three separate phases of the ordinance:

(a) The portions of the oath which are prospective in their operation.

(b) The portions of the oath which cover the period of five years just preceding, and

(c) The affidavit requirement of the ordinance.

A. THE CONSTITUTION DOES NOT FORBID A REQUIREMENT BY THE PEOPLE OF A STATE THAT THEIR EMPLOYEES PROMISE ALLEGIANCE TO THE UNITED STATES AND TO THE STATE.

This proposition has never been questioned, so far as we can find, by any decision of this Court or by any verdict of history, and we doubt that it has ever been questioned by a citizen of this country before the generation of the activities which presumably impelled such legislative action as is presented here, and in other cases pending before this Court, such as *Dennis v. United States* (183 F. 2d 201), No. 336; *Bailey v. Richardson* (182 F. 2d 466), No. 766, and *Thompson v. Wallin* (301 N. Y. 476, 95 N. E. 2d

806), No. 599, and as was presented in *Gerende v. Board* (..... Md. ..... Atl. 2d .....), No. 577, just decided.[12]

The Constitution prescribes the oath to be taken by the President (Article II, Section 1) and requires that an oath of allegiance be taken by the members of Congress, the members of the State Legislatures, and all executive and judicial officers, both of the United State and of the several states. (Article VI, Section 3.) The Fourteenth Amendment, out of which the petitioners attempt to torture a prohibition against the oath involved here, itself provides for the perpetual disqualification of any officer who has violated an oath of allegiance by engaging in insurrection or rebellion or by other commission of treason (Fourteenth Amendment, Sec. 3), and the preamble to the Constitution, and the whole scope, purpose and meaning of the Constitution establish the fallacy of the idea that the states must employ those who lack allegiance or that the states may not require an affirmation of allegiance from their officers and employees. The constitutional Bill of Rights is not a suicide pact (dissenting opinion of Mr. Justice Jackson, *Terminiello v. Chicago*, 337 U. S. 1, 37 (93 L. Ed. 1131, 1151)), and "the constitution was adopted to preserve our government, not to serve as a protecting screen for those who, while claiming its privileges, seek to destroy it."

[12] *Cf.* Concurring and dissenting opinion of Mr. Justice Jackson in *American Communications Association v. Douds*, 339 U. S. 382 (94 L. Ed. 925), and the authorities and references there cited; and see the House Report on HR 9490, Vol. 2, U. S. Code Congressional Service, 81st Congress, 2nd Session, 1950, p. 3886. *Cf.* also, the opinion of this Court and the dissenting opinion of Mr. Chief Justice Stone, in *Schneiderman v. U. S.*, 320 U. S. 118 (87 L. Ed. 1796).

(*U. S. ex rel. Milwaukee Social Democratic Club v. Burleson*, 255 U. S. 407, 414 (65 L. Ed. 704, 710.)[18]

[18]For a short discussion of the historic value and meaning of oaths of allegiance see the opinion of Chief Justice Vanderbilt of the Supreme Court of New Jersey in *Imbrie v. Marsh*, 3 N. J. 578, 71 A. 2d 352, at pages 353 to 354.

The general conception of the value and validity of an oath of allegiance is recognized in the Constitution, as is the idea of the value of citizenship in public officers. This idea is oft expressed in the constitutions and statutes of California and of the other states and is but a limited expression of the larger principle, implicit in the nature of government, that the officers and employees of government—the agents by whom the will of the people must necessarily be executed—must, for the effective execution of their public tasks and the preservation of the government itself, be identified with the government and with the people from whom its power flows.

Citizenship as such, perhaps, is in a sense a negative condition—the condition of not being under any lawful allegiance to a foreign power. In the larger sense of citizenship as being a positive condition of affirmative loyalty to the nation, additional protection to the public interest is found in citizenship requirements for public service.

The Constitution by which the people of the United States agree to unite for their government, for their common defense, and for the promotion of the general welfare, does not require that they be so naive as to look no further than record citizenship to determine the most essential requisite of their officers and servants. Recognition of the additional security of a formal oath is found in the constitutional requirement that the President himself shall swear to preserve, protect, and defend the Constitution of the United States (Art. II, Sec. 8), but whether or not the requirement of an oath of allegiance is a salutary or sufficient device to secure the loyalty that such an oath affirms is not the question here. The choice of methods in such cases is for the people themselves through their legislative representatives. Here the people of the City of Los Angeles have solemnly decided that a formal affirmation of loyalty by their servants will tend to instill or preserve such loyalty and that such requirement may discover some of those who lack the required devotion to the common good. Whether that decision by the people of the City of Los Angeles was either wise or necessary is not a subject for debate here—the proper forum for that purpose was the Council chamber, when the ordinance in question was under consideration (*Lockheed Aircraft Corp. v. Superior Court*, 28 Cal. 2d 481, at 486 (171 P. 2d 21).)

In this proceeding we are concerned not with matters of wisdom, but with questions of power. (*Canteline v. McClellan*, 282 N. Y.

B. THE CONSTITUTION DOES NOT FORBID A REQUIREMENT BY THE PEOPLE OF A STATE THAT THEIR EMPLOYEES ASSERT THEIR ALLEGIANCE DURING THE PERIOD OF THE PAST FIVE YEARS.[14]

Since the First Amendment does not establish or protect any right to advocate forcible revolution, and since a state

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166 (25 N. E. 2d 972).) We think that the case states its own answer. The soundness of the proposition stated in our Point III-A becomes more apparent if we state its opposite, which is the petitioners' essential contention: that the people of the City of Los Angeles (and, of course, upon the same argument the people of the State of California and of the United States) may not inquire of the loyalty of their servants except where the Constitution itself expressly requires that an oath be taken by a particular officer; they must choose their servants according to tests only of their physical health and their technical knowledge and competency, and they may discharge them only for their loss of those qualities or for their breach of some penal statute. Perhaps even the petitioners would concede that employees may be discharged for observable insolence to the general public, but they nevertheless still deny the right of the public to inquire as to whether or not the employee proposes, when the day comes, to flout its wishes and to establish by force another or even an alien government.

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[14]In our statement of this point we specify a period of five years because that is the period involved in the ordinance oath presented here, but by doing so we do not mean to concede that California might not inquire over a longer period, nor that California might not require from its employees a record of allegiance, continuous and unbroken, from the time in each case that the duty of allegiance arose. Here, the petitioners alleged citizenship in their petition to the Superior Court [R. 1]. This allegation was necessary to the initial statement of their claims, since they would not have been lawfully employed in the service of the City if they were not citizens of the United States. (Charter of the City of Los Angeles, Sec. 103 [Stats. 1935, p. 2340]; California Labor Code, Sec. 1941.) Although not all of them had been employed by the City for five years before December 5, 1948, the effective date of the ordinance [R. 2, 18], it must be presumed, at least in support of the state action here, and in any event in the absence of any showing to the contrary before the Civil Service Commission or any allegations to the contrary in their petition to the Superior Court, that all had been citizens of the United States during that five-year period. It follows that all had been under a natural duty of allegiance during that period.

may require of its employees an oath of future allegiance, the only question which arises here is whether or not this retrospective feature of the ordinance constitutes a bill of attainder or an *ex post facto* law within the meaning of Article I, Section 10 of the Constitution. The petitioners assert that it does, relying partly upon *Cummings v. Missouri*, 4 Wall. 277 (18 L. Ed. 356), *Ex parte Garland*, 4 Wall. 333 (18 L. Ed. 366) and *United States v. Lovett*, 328 U. S. 303 (90 L. Ed. 1252), but primarily upon their hope that this Court will now carve out a new rule that the states may not inquire into their employees' allegiance at any time in the past.

An examination of the questions sought to be presented requires some further analysis of the provisions of the ordinance and of the facts of the case, particularly since, as pointed out in our statement of the case some of those facts are not as they are claimed to be in the petitioners' brief:

The ordinance has no penal provisions pertinent here. It does not declare that the failure of a city employee to take the prescribed oath shall be a public offense or cause for his dismissal, nor that any employee shall be discharged for his failure to take the prescribed oath, nor does it attempt to mandate or prejudge those questions.

While in our view the validity of the ordinance does not depend to any degree upon the existence of Charter Section 432 (see p. 8, this brief) the existence of that Charter section and of the requirement contained therein, since the year 1941, is itself a complete and separate answer to the petitioners' complaint that the ordinance imposes a retroactive duty upon them. The duty upon the petitioners, during the five years preceding December 5, 1948, not to advocate forcible revolution and not know-

ingly to belong to any organization which did advocate forcible revolution, was a duty imposed upon them by their citizenship, by any traditional oath of office that they might have taken (there is no negation of such in the record), and if need be, by the provisions of the Smith Act (Title 18, U. S. Code, Sec. 2385) and the California Syndicalism and Sabotage Act (Stats. of Calif., 1919, p. 281, Appendix VII, p. 11), whether or not there had been any Section 432. But in addition, Section 432 separately imposed such a duty upon the petitioners, if they were working for the City of Los Angeles during that period, or as to those who were first employed by the City, subsequent to December 4, 1943. Section 432 set up such duty as a prerequisite condition and qualification to such employment.

If it were the fact that any of them advocated forcible revolution or belonged to any organization which advocated forcible revolution during that five-year period, he might have been discharged for cause for disobedience of that Section, whether or not Ordinance 94,004 had ever been adopted. As to those who became employees of the city during that five-year period, their appointments might have been refused or they might have been discharged thereafter if it appeared that they were not in compliance with Charter Section 432 during that period.

There is thus no opportunity whatever for the petitioners to claim, if any such valid claim could be made, that a new condition of employment was imposed upon them by the retrospective provision of the oath provided by the ordinance.

Aside from all of this, however, the people of the City would clearly be entitled to require of their servants as an absolute condition and qualification to their continued employment, not only a promise of future allegiance but a

showing of past allegiance as well, as a guarantee of future action. Indeed, on page 12 of their petition, the petitioners concede as much. And such a condition could validly be imposed retroactively.[15]

The only other possible approach remaining to the petitioners, again an inadmissible one, is that the required oath compels them to deny overt advocacies and affiliations toward forcible revolution during that five-year period and their complaint must be this: assuming that any one of them had engaged in such overt advocacies or affiliations during the five-year period, he could not truthfully disavow it, and was thus placed in a position where his failure and refusal to take the oath became a possible cause for his discharge where without the oath he might have rested in his postion until the City charged him directly with overt advocacies or affiliations and discharged him for such cause. The questions thus sought to be presented are these:

> (1) Did the oath requirement unlawfully compel the petitioners to testify against themselves in violation of the Fifth Amendment?
>
> (2) Was the oath requirement, as applied to the petitioners, a bill of attainder or *ex post facto* law in contravention of Article I, Section 10 of the Constitution?

These questions will be discussed separately.

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[15]See *Hawker v. New York*, 170 U. S. 189 (42 L. Ed. 1002); *Dent v. West Virginia*, 129 U. S. 114 (32 L. Ed. 623); *Cantelise v. McClellan*, 282 N. Y. 166 (25 N. E. 2d 972); *Crampton v. O'Mara*, 193 Ind. 551 (139 N. E. 360) (appeal dismissed, 267 U. S. 575 [69 L. Ed. 795]). *Cf. Myers v. United States*, 272 U. S. 52 (71 L. Ed. 160).

1. The Oath Requirement Did Not Compel the Petitioners to Testify Against Themselves, and in Any Event, No Provision of the Constitution Prohibits Such State Action as That Here Under Consideration.

(a) The ordinance is not criminal or penal in its nature, contains no provision for the punishment of any person who fails to comply with its oath requirements, and is not supported by any compulsion provided in any other statute or ordinance. The petitioners were free to take the oath, or not to take it, as they might be advised. Consequently, no constitutional inhibition against compulsory incrimination could have any application to them. This proposition is well established in California law, and the point is one to be determined according to California law. (*Christal v. Police Commission*, 33 Cal. App. 2d 564 (92 Pac. 2d 416) (hearing by Supreme Court of California denied p. 573).)[16]

(b) The provision of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" applies only to the federal government and does not constitute a limitation upon state action under the provisions of the Fourteenth Amendment, except where self incriminating testimony is compelled by torture, exhaustion, or the like, or where the circumstances are otherwise such that this court must conclude that the

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[16]The privilege against self-incrimination is as broad as the compulsion to testify and no broader. *May v. U. S.*, 175 F. 2d 994 (cert. denied 338 U. S. 830, 882 [94 L. Ed. 505, 542]), *Heike v. U. S.*, 227 U. S. 131 [57 L. Ed. 450].

prisoner's liberty was thus taken from him without due process of law.

Adamson v. California, 332 U. S. 46 (91 L. Ed. 1903);

Snyder v. Mass., 291 U. S. 97, 105 (78 L. Ed. 674, 678);

Twining v. New Jersey, 211 U. S. 78 (53 L. Ed. 97).

Compare:

Quicksall v. Michigan, 339 U. S. 660 (94 L. Ed. 1188);

Wolf v. Colorado, 338 U. S. 25 (93 L. Ed. 1782);

Bute v. Illinois, 333 U. S. 640 (92 L. Ed. 986);

Hamilton v. University of California, 293 U. S. 245, 261 (79 L. Ed. 343, 351);

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158.

2. The Oath Requirement Does Not, Either on Its Face or as Applied Here, Constitute a Bill of Attainder or an Ex Post Facto Law in Contravention of Article I, Section 10 of the Constitution.

The petitioners' historical discussion points up the reasons for the constitutional prohibition of bills of attainder and in large measure establishes their definition. As stated by the petitioners, bills of attainder deny due process, deny equal protection under the laws and the right of jury trial, substitute the inquisitorial system for the accusatorial system and arbitrarily impose judgment or penalty, and as the petitioners also point out, the root of all of these objections to bills of attainder is that they are contrary to the fundamental principle of separation of powers.

When the oath requirement is examined, both on its face and in its application here, it is clear that it has none of these characteristics. As heretofore pointed out, the requirements of due process are not applicable in a governmental employment situation and neither the petitioners nor anyone else would suggest that public employees are entitled to a trial by jury or to a trial in court before they may be dismissed. There is here no violation of the equal protection principle, because the foundation of the action taken with respect to the petitioners rests upon a valid classification. The ordinance does not provide for or impose any punishment or penalty; the petitioners' discharges were effected by administrative authority, and not by the ordinance. Finally, in the effectuation of these discharges, the legislative body played no part; the discharges were effected by administrative officials and were reviewed by a quasi-judicial local board, pursuant to the provisions of the applicable general statute (Charter, Section 112(a)).

But the innuendo of the petitioners' argument still remaining is that the ordinance in effect substitutes the inquisitorial system for the accusatorial system, contrary to our traditions and beliefs. No such complaint may validly be made unless it depends upon a general principle which would be applicable in other situations, and any such general principle would have to be this: the people may not inquire of their employees concerning such matters of cause for discharge or qualification for continued employment as the people deem relevant. Instead, a definitive statute or regulation must be promulgated declaring and defining the things which will constitute disqualification, and thereafter, to effect the discharge of one of their employees, the people must accuse him and prove their case against him as if he were a defendant in a criminal case.

Indeeed the petitioners' argument goes even further, to the contention that past conduct is not a matter of relevant interest in such cases.

If the absence of authority or precedent for these claims were not enough to answer them, reason alone is—their mere statement demonstrates their invalidity.

The petitioners also complain that the ordinance in its operation effects their perpetual exclusion. This is not true if they withheld execution of the oath because of some philosophic misconception, although they might truthfully have taken it. If there be such among them, nothing in the Charter or ordinances of the City will prevent such a one from being reappointed to a position in the City's service upon his attaining a place on a competitive list, and upon his execution of the required oath and affidavit. On the other hand, if there be any among them who could not truthfully take the oath, he is, of course, hereafter, under Charter Section 432, perpetually excluded from City employment. No constitutional question arises from this situation, however, since the difference in the treatment of such person and others not so disqualified arises from the appropriate classification contained in Section 432, and is based upon a completely relevant proposition: that the people of the City of Los Angeles are not willing to employ in their service any person who has violated his allegiance to the United States by advocating the forcible overthrow of the government or by belonging to organizations which are engaged in such activities. The determination of such matters is for the states and for the legislative bodies.

Re Summers, 325 U. S. 561 (89 L. Ed. 1795);
Cohen v. Wright, 22 Cal. 293;
Ex parte Yale, 24 Cal. 241.

We find nothing in *Cummings v. Missouri*, 4 Wall. (U. S.) 277 (18 L. Ed. 356), or *Ex parte Garland*, 4 Wall. (U. S.) 333 (18 L. Ed. 366), upon which the petitioners rely so heavily, which at all supports the petitioners' contentions. Those cases involved the desire of a priest to carry on his ministry and the desire of a lawyer to practice his profession. Neither of them involved the right of the people of a state to determine for themselves the qualifications of their own employees. As always, the general expressions of those cases must be limited to the facts before the Court, and as this Court pointed out in *Dent v. West Virginia*, 129 U. S. 114 (32 L. Ed. 623), and *Hawker v. New York*, 170 U. S. 189 (42 L. Ed. 1002), the basis of the decisions in *Cummings* and *Garland* was that in the provisions of qualification many things required were wholly irrelevant to the matters involved.

United States v. Lovett, 328 U. S. 303 (90 L. Ed. 1252), involved a legislative perpetual exclusion of named persons and the majority there thought that the statute therefore came within the prohibition of bills of attainder. Here there is classification, accusation, quasi judicial hearing and determination. In *Lovett* there were none of those.

With respect to this bill of attainder contention, the following language of the Court in *Cummings v. Missouri*, 4 Wall. (U. S.) 277 (71 L. Ed. 356), is apposite since it makes it very clear that this Court would not have struck down the oath there if the requirement had been narrowly drawn as a means of ascertaining whether or not the persons affected were qualified only for public office or for professions licensed by the State. The Court said there, at page 320.

"The oath could not, therefore, have been required as a means of ascertaining whether parties were quali-

fied or not for their respective callings or the trusts with which they were charged."

Although the petitioners have never claimed that they were ignorant of the ordinance directive, or that they lacked reasonable opportunity to comply with it, we may well notice that the record shows a vigilant determination by the appointing officers that the effect of the directive should work no unfairness upon the ignorant or uninformed or upon any who might misunderstand it, and that each of the petitioners was specifically advised of the directive. [R. 3-4.]

C. THE CONSTITUTION DOES NOT FORBID A REQUIREMENT BY THE PEOPLE OF A STATE THAT THEIR EMPLOYEES DISCLOSE INFORMATION RELEVANT TO THEIR EMPLOYMENT. WHERE THE LEGISLATIVE BODY REQUIRES THE DISCLOSURE OF SPECIFIED INFORMATION, THE INTENDMENTS OF SUCH LEGISLATION ESTABLISH THE RELEVANCY OF THE INFORMATION REQUESTED, UNLESS IT APPEARS ON THE FACE OF THE STATUTE NOT TO BE AT ALL RELEVANT, AND OTHERWISE THE PRESUMPTION OF THE STATUTE MUST STAND UNLESS THERE IS PLEADING AND PROOF THAT THE INFORMATION REQUESTED IS WHOLLY IRRELEVANT.

We are here concerned with the city's right to inquire as to the membership of its employees in two named organizations only—the Communist Party of the United States and the Communist Political Association. The principle involved, however, is no different than would be the case if the inquiry were as to membership in the Ku Klux Klan or in the Mafia.

By such an inquiry the people seek information. By their implied legislative determination that such information is relevant to an employee's character, capacity, or eligibility, such relevancy is established in the absence of contrary evidence. (*Gitlow v. New York*, 268 U. S. 652, 668, 671 (69 L. Ed. 1138, 1146, 1148.)

The petitioners' contention seems to be that the public cannot inquire as to its servants' membership in any organization unless in response to an attack upon such inquiry the people plead and prove complete and ultimate justification for their interest.

Clearly, the burden here sought to be fastened upon the people is placed instead upon the appellants: had they shown irrefutably before the Civil Service Commission that the Communist Party of the United States and the Communist Political Association are organizations of a genuinely political character, whose books, records and membership are freely open to all interested and whose purposes and methods are lawful, they would no doubt have been able to state a case in the state court. Such was not done or attempted; no allegations to such effect were made to the state court, and consequently the petitioners' petition was properly denied.

Without at all admitting that the people have a right to expect allegiance to their government from their own employees the petitioners apparently seek to manufacture an exception from this principle of legislative intendment on the basis of the nomenclature of the organizations here in question. Because the Communist Party of the United States of America calls itself a party, they say, it must be a political party, comparable in all significant ways with the Republican Party, the Democratic Party, the Socialist

Party and the like. Because the Communist Political Association calls itself a political association, they say, it must perforce be a political association comparable in all material respects with, say, the Young Republicans or the Young Democrats.

Was the trial court entitled, or is this Court empowered, to reach such conclusions as to the Communist Party of the United States or as to the Communist Political Association? To suggest such a proposition is to ask that the courts close their eyes and ears. That these two organizations are the opposite of these things we do not ask the court to find as a matter of law—such findings have been made and we make bold to say will be made again in appropriate forums when this proposition is properly placed in issue—but neither does it follow at all from mere assertion that the affirmative of this proposition is true. That the contrary is asserted by the highest officers of the United States is well known to the Court. And the Court is likewise aware that perhaps the larger body of the public opinion commonly accepts the proposition that these organizations are in fact conspiratorial, subversive, and treasonable in their nature. That these propositions are denied by some spokesmen for these organizations merely takes them out of the field of judicial notice but by no means establishes the contrary as the truth.[17] But the petitioners must contend that it is an

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[17] *Cf. Communist Party v. Peek*, 20 Cal. 2d 536 (127 P. 2d 889); *American Communications Assn. v. Douds*, 339 U. S. 382, (94 L. Ed. 925); *Osman v. Douds*, 339 U. S. 846 (94 L. Ed. 1328); *Schneiderman v. U. S.*, 320 U. S. 118 (87 L. Ed. 1796); *Barsky v. U. S.*, 167 F. 2d 241 (cert. den. 334 U. S. 843) (92 L. Ed. 1767); *Dunne v. U. S.*, 138 F. 2d 137 [cert. den. 320 U. S. 790 (88 L. Ed. 476)]; *People v. Stevlik*, 187 Cal. 361 (203 Pac. 78). And see *U. S. v. Dennis*, 183 F. 2d 201 (cert. granted, 10/23/50 [95 L. Ed. Adv. Op. 43]).

accepted proposition, established beyond refutation, that the Communist Party and the Communist Political Association are lawful organizations, with lawful objectives proposed to be accomplished by lawful means. To ask this Court to acknowledge such to be the facts is to ask this Court to establish a new rule of judicial notice—that nomenclature and denomination establish the facts connoted. Indeed, it is to ask for more than that, for if a fact is the subject of judicial notice it cannot be impeached even by evidence proposed to be offered, and thus the petitioners are asking this Court to adjudge, without evidence, that these are lawful organizations.

Only by substantiating the propositions thus stated can the petitioners hope to succeed in their challenge of the affidavit provisions of the ordinance. Lacking such substantiation, the attack must fail, for these provisions are then seen to be what in fact they are—provisions for an inquiry by the people into the activities of their employees which possibly, if not probably, are directed at the continued existence of the United States itself. Could any consideration be more relevant to eligibility for public employment?

Such inquiries with respect to the people's employees are even more requisite than inquiries into such activities by persons outside of governmental administration. And as the Court said in *Barsky v. United States*, 167 F. 2d 241 at 246 [Certiorari denied, 334 U. S. 843 (92 L. Ed. 1767)]:

"This existing machinery of government has power to inquire into potential threats to itself, not alone for the selfish reason of self-protection, but for the basic reason that having been established by the people as an instrumentality for the protection of the rights of people, it has an obligation to its creators to preserve itself . . ."

Nor is government required to delay inquiry until the danger of its overthrow by force is clear and present. In the *Barsky* case *(supra)*, the Court expressed its views on this point as follows (pp. 246, 247):

". . . We are referred to the 'clear and present danger' rule expressed by Mr. Justice Holmes in *Schenck v. United States* and extending through the line of cases cited and discussed in *Bridges v. State of California*. But all those cases dealt with statutes which actually imposed a restriction upon speech or publication. In our view, it would be sheer folly as a matter of governmental policy for an existing government to refrain from inquiry into potential threats to its existence or security until danger was clear and present. And for the judicial branch of government to hold the legislative branch to be without power to make such inquiry until the danger is clear and present, would be absurd. How, except upon inquiry, would the Congress know whether the danger is clear and present?"

It should be noted, also, in connection with the petitioners' somewhat obscure contention that the affidavit

requirement constitutes a bill of attainder, that it not only implements Charter Section 432, but that it also implements Section 1028 of the California Government Code. (Appendix V, p. 10.)

Here the argument is that the affidavit requirement singles out members of the Communist Party and the Communist Political Association and seeks to punish such members or to deprive them of their jobs.

Inasmuch as the oath prescribed and required by Sections 1 and 2 of the ordinance specifies neither the Communist Party nor any other by name, but is directed only at organizations advocating the forcible overthrow of the government, the petitioners' argument apparently assumes that the Communist Party is one which engages in such advocacy. If such be the fact, its members' claims to city employment are not, as we have shown, protected by the Constitution. Sections 3 and 4 of the ordinance require each employee to execute an affidavit stating whether he is or ever was a member of the Communist Party of the United States or the Communist Political Association, but the ordinance contains no provision requiring the removal of an employee who answers in the affirmative. The petitioners were discharged only for their refusal to take the oath or execute the affidavit, and then only after a hearing before the Board of Civil Service Commissioners as provided in the City Charter. It is clear, therefore, that the cases cited by the petitioners have no application to the facts of this case.

POINT IV.

The Petitioners' Briefs and Petition.

The petitioners' authorities, so far as seems necessary, have been considered, with the following exceptions:

In support of their petition for certiorari the petitioners pointed to the grant of certiorari in *Steiner v. Darby*, 337 U. S. 929 (93 L. Ed. 1737) [88 Cal. App. 2d 481 (199 P. 2d 429)], and to the opinion of this Court dismissing that proceeding (338 U. S. 327 (94 L. Ed. 144)), in which reference was made to *Communist Party v. Peek*, 20 Cal. 2d 536 (127 P. 2d 889), and to *James v. Marinship Corporation*, 25 Cal. 2d 721 (155 P. 2d 329). Nothing in those decisions supports the position of the petitioners here.

The petitioners also suggest an inconsistency between the decision of the state courts here and the decisions in *Danskin v. San Diego*, 28 Cal. 2d 536 (171 P. 2d 885), and *Tolman v. Underhill*, ... A. C. A. .... (.... P. 2d ....).

In the *Danskin* case the court reached a conclusion similar to that reached by this Court in *DeJonge v. Oregon*, 299 U. S. 353 (81 L. Ed. 278). The question involved was whether or not a group of persons had a right to use a public auditorium for a lawful purpose on the same basis as other groups might use it, if such organization otherwise had unlawful purposes. The Supreme Court of California said that it did, upon the same principle that this Court held in *DeJonge*, that the petitioner could not be punished for attending an open meeting of an organization which had unlawful aims, where such meeting was itself in all respects peaceable and did not involve any unlawful activity. While the language of the *Danskin*

opinion seems to go too far and not to have been required by the case before the court, the conclusion reached conflicts not at all with the state action here presented. The court simply held that the fact that one belongs to an organization which advocates forcible revolution was irrelevant to his entitlement to use a public auditorium, for lawful purposes. So, such membership would be irrelevant to a citizen's right to receive protection from the fire department, but the case here presented is whether or not such a one is entitled under the Constitution to occupy a position in the service of the people whose government he proposes to overthrow.

In *Communist Party v. Peek, supra,* the decision was based upon a corrollary of the proposition for which we have contended here under Point III-C.

James v. Marinship Corporation, supra, did not involve any questions of state action or of the powers of the people of California under the Constitution to insure that their employees would serve them faithfully, but rather only the question of whether or not a closed shop might be enforced by a labor union where it arbitrarily closed or partially closed membership in the union to members of the negro race.

Toliman v. Underhill, supra, is of course not final, and we apprehend that it is not unlikely that a hearing will be granted by the Supreme Court of California. It seems to us that the decision probably conflicts with the decision of the District Court of Appeal here [R. 40-46], with the decision of the District Court of Appeal in *Steiner v. Darby, supra,* and with a number of decisions of the California Appellate Courts, including *Wall v. Board of Regents,* 38 Cal. App. 2d 698 (102 P. 2d 533),

Technically, of course, the *Tolman* decision is of no relevancy here: if there is a conflict between it and those other state decisions it is for California and not for this Court to resolve that conflict. Furthermore, the basis of the *Tolman* opinion is not the Federal Constitution, but rather two provisions of the California Constitution—one of which provides for the government of the University of California, and the other of which provides an exclusive oath for officers of the State. Consequently, the grounds of the decision are purely state grounds and they further obviously could have no pertinency here—the petitioners were not officers of the State of California.

Schneiderman v. United States, 320 U. S. 118 (87 L. Ed. 1796), involved neither criminal sanctions nor a test for public employment, but only the narrow question of whether or not the government had established fraud in the inception of Schneiderman's naturalization. The majority of this Court thought there that the government had failed to sustain the heavy burden of proving by "clear, unequivocal and convincing evidence" that Schneiderman advocated revolutionary change by force and violence. Neither the judgment nor the opinion of the court established the proposition that one has a constitutional right to advocate violent revolution, whether or not the execution of his proposal is to be deferred to a future date. On the contrary this Court's determination was expressly based upon the proposition (p. 146 (87 L. Ed. 1813)) that the record failed to establish that Schneiderman believed in and advocated the employment of force and

violence, instead of peaceable persuasion, as a means of attaining political ends, or that his "beliefs on the subject of force and violence were such that he was not attached to the Constitution" at the time of his naturalization.[18]

The petitioners seize upon passages from our brief in opposition to certiorari and attempt to build an argument favorable to them of administrative construction of the ordinance, based upon those passages out of context. We think it appropriate to say that whatever the rule may be in other states, counsel for the respondent City of Los Angeles have no authority to affect the power of the legislative body or to change the effect of legislative acts or otherwise to intrude on the legislative function. The passages in our brief in opposition (pp. 15, 20, 21) to which counsel refers, do not, of course, admit of the construction sought to be placed upon them.

Nowhere does the petitioners' argument find any support, because their major premise is wrong—there is no constitutionally protected right to advocate the forcible overthrow of the existing constitutionally established government of the United States. Nowhere could it find any support, because their second premise is wrong—the power to appoint carries the power to remove (*Myers v. U. S.*, 272 U. S. 52 (71 L. Ed. 160)), and there is no vested or property right in public office.

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[18] *Cf.* The dissenting opinion of Mr. Chief Justice Stone at 320 U. S. 170 (87 L. Ed. 1826), and see also Wiener, "'Freedom For The Thought That We Hate': Is It a Principle Of The Constitution?" 37 Am. Bar Ass'n Journal, 177 (March, 1951). See also *Re Summers*, 325 U. S. 561 (89 L. Ed. 1795).

POINT V.

The Ultimate Contentions of Amicus Curiae, the American Civil Liberties Union, Are Invalid and Without Support in the Decisions of This Court.

In general the invalidity of the contentions of the *amicus curiae* has been established by the facts of the case and by our foregoing argument. However, some general observations appear to be in order and some specific reply will hereafter be made.

In its prefatory statement, referring to the ordinance and assertedly similar legislation, the *amicus* says (A. C. Br. p. 1):

> "This widespread manifestation of legislative action has aroused the interest and concern of thinking people everywhere."

And the argument thereafter, in large measure, is directed to the idea that often unwise, improvident or unjust things are done by executive or legislative authority and that, happily, appeal may successfully be made to the courts to correct such things.

The Judicial Department Is Not Concerned With Wisdom or Policy.

It is said of the ordinance that while a requirement of an oath of allegiance may well be pertinent to "policy making" or "security" positions, no real harm to the people may be foreseen should an advocate of forcible revolution continue to hold his position as street cleaner. (A. C. Br. p. 8.) It is said further that neither inquiry about nor assurance of a public employee's *past* allegiance is relevant, since a man may come no longer to advocate

forcible revolution and as a result lose his "initial disqualification to participate in the deliberations, activities or fruits of Democratic Government." (A. C. Br. p. 9.) And finally, the *amicus* argues, in effect, that even if there be no actual infraction of constitutional rights, the ordinance is reminiscent of test oaths and witch hunt persecutions in the past and symptomatic of anticipated future requirements for social, economic, political and religious orthodoxy. (A. C. Br. pp. 15-16.)

The essential contentions implicit in this phase of the argument of the *amicus* have been time and again conclusively rejected by this Court,[19] but their insistent reiteration suggests some further reply.

Widespread concern with manifestations of legislative action or with manifestations of executive action is in no way novel, but this concern cannot well be abated by judicial correction of the other branches of government. In addition to the objections many times expressed by this Court it may be further noted that there is frequent widespread concern with manifestations of judicial action. Legislative representatives of the people, officers of the executive department, government lawyers, administrative personnel and large sections of the public are frequently reminded of the dangers and abuses inherent in proposals for judicial supremacy. Trial courts in various jurisdictions often still undertake to correct what they deem to be legislative or executive unwisdom, by stepping into the shoes of highway commissions, personnel boards, park departments, health officers, and legislative bodies and by directing the construction of roads, writing civil service examinations, selecting sites for improvements, writing

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[19]See this brief, Point III.

sanitary regulations, revising the tax laws and the like. Fortunately, under the leadership of this Court, the appellate courts throughout the nation have for the most part struck down such judicial trespasses. The general argument of the *amicus* urges that this Court reject those precedents, and by the enunciation of new principles applicable here and extendible elsewhere, establish the judiciary as a censor of the policies and wisdom of the other two departments of the government.

The Court Is Not Concerned With the Administrative Operations of the State.

There is no constitutional basis for the suggestion that questions relative to the administrative operations of the states, such as the appointment or dismissal of state employees, is of concern to this Court, nor has the proposition been successfully disputed in any court, that the power of appointment carries with it the power of discharge, except as it may be, and only to the extent that it is, limited by the very authority which delegated the power of appointment. The decisions cited by the *amicus* under its Point II in no instance support any contrary proposition and the state cases cited are irrelevant, since they merely concern questions of the interpretation of the state statutes which created and also restricted the appointing or discharging power.

To contend, as does the *amicus*, that any state action relating to the employees of the state is subject to "strict scrutiny" to determine whether its effect, "directly or indirectly" is to deprive or limit any basic freedom (A. C. Br. p. 6), is to ask a total abandonment by this Court of the established principles heretofore stated under our Point III.

The Contentions of the Amicus Must Fail for Like Vulnerability With Those of the Petitioners.

In our view, the brief of *amicus* frankly reaches the ultimate conclusion of its generalized argument, that there is some sort of a right, even though limitable, to advocate forcible revolution and even at the same time to occupy a position in the service of the people, for it is proposed that an oath of allegiance as a prerequisite to public employment cannot stand unless the people can affirmatively show that the employment by them of a few or all of those persons who advocate forcible revolution would constitute a clear and present danger. (A. C. Br. p. 10.)

Finally, the *amicus* misreads the ordinance and ignores the City's Charter. (A. C. Br. pp. 7-9, 11, 13.) The ordinance does not inquire of "attitudes," "views," or "opinions," nor does it require a disavowal of membership in any organization which "might become" or "sometime in the future" will be engaged in the advocacy of forcible revolution; and the Charter forbids a final discharge of a classified employee at the sole discretion of any official, but instead insures that no such dismissal, under the ordinance or otherwise, shall stand, against appeal, unless the City's Civil Service Commission is satisfied after a full hearing that the cause stated was sufficient and that it was supported by the facts. This should make it clear that the ordinance does not, as claimed, "in its very nature" call for any sanction whatever. (A. C. Br. p. 13.) The decision of sanction must first be made by the appointing authority and it must be sustained by the Civil Service Commission. These Charter provisions, in our view, are by no means compelled by the Constitution. We point them up here only that the Court may not be misinformed.

Conclusion.

It is respectfully submitted that there is no conflict between any provision of the Constitution of the United States and the decisions here of the Board of Civil Service Commissioners of the City of Los Angeles, and the courts of California.

It follows that the decisions and judgments of the courts below should be affirmed.

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APPENDIX.

I.

SECTION 80 OF THE CHARTER OF THE CITY OF LOS ANGELES.

(Statutes of California 1925, page 1058)

"Subject to the provisions of this charter, the rules of the department and the instruction of his board, said general manager shall have the power and duty:

(1) To administer the affairs of the department as its chief administrative officer;

(2) To appoint, discharge, suspend, or transfer the employees of the department, * * * and to issue instructions to said employees, * * * in the line of their duties, all subject to the Civil Service provisions of the charter;

* * * * * * * * * *

II.

SECTION 112(a) OF THE CHARTER OF THE CITY OF LOS ANGELES.

(Statutes of California 1945, page 3102)

"Any board or officer having the power of appointment of officers, members and employees in any department of the government of the city shall have the power to remove, discharge or suspend any officer, member or employee of such department; but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or sus-

pended except for cause, which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing such removal, discharge or suspension shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed, discharged or suspended to be reinstated or restored to duty. The order of said board with respect to such removal, discharge or suspension shall be forthwith certified to the appointing board or officer, and shall be final and conclusive; provided, that the order of any appointing board or officer suspending any person because of lack of funds in such department shall be final, and shall not be subject to review by said Board of Civil Service Commissioners. If the Board of Civil Service Commissioners shall order that any person removed, discharged or suspended under the provisions of this section be reinstated or restored as

above provided, the person so removed, discharged or suspended shall be entitled to receive compensation from the city the same as if he had not been removed, discharged or suspended by the appointing board or officer."

III.

Ordinance No. 94,004.

An Ordinance to effectuate the provisions of Charter Section 432 and otherwise to insure the loyalty of the officers and employees of this City.

The People of the City of Los Angeles Do Ordain As Follows:

Section 1. Every person who is hereafter elected or appointed to an office or position in the service of the City of Los Angeles must, before entering upon the duties of his office or position, take and subscribe to the following oath:

I, ..., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America and the State of California, and will support and defend the Constitution and laws of the United States of America and of the State of California and the laws of the City of Los Angeles against all enemies, foreign and domestic. I further swear (or affirm) that I do not advise, advocate or teach, and have not within the period beginning five (5) years prior to the effective date of the ordinance requiring the making of this oath or affirmation, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California and that I am not now and have not, within said period, been or become

a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of California. I further swear (or affirm) that I will not, while I am in the service of the City of Los Angeles, advise, advocate or teach, or be or become a member of or affiliated with any group, association, society, organization or party which advises, advocates or teaches, or has within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California, that I will well and faithfully discharge the duties of my office or employment in the service of the City of Los Angeles and that I take this whole obligation freely without any mental reservation or purpose of evasion, So Help Me God.

Sec. 2. Every person who now holds or occupies an office or position in the service of the City of Los Angeles must, within thirty (30) days after the effective date of this ordinance, or if he be on leave or under suspension for cause from the service of the city at such effective date, within thirty (30) days after his return to such service, take and subscribe to the oath set forth in Section 1 hereof.

Sec. 3. Every person who is hereafter elected or appointed to an office or position in the service of the City of Los Angeles must, before entering upon the duties of his office or position, execute an affidavit stating whether or not he is or ever was a member of the Communist Party of the United States of America or of the Communist Political Association, and if he is or was such a member, stating

the dates when he became, and the periods during which he was, such a member; provided, however, that no additional affidavit shall be required on account of the transfer, demotion or promotion of any person who has once executed an affidavit under this section or under Section 4 hereof.

Sec. 4. Every person who now holds or occupies an office or position in the service of the City of Los Angeles must, within thirty (30) days after the effective date of this ordinance, or if he be on leave or under suspension for cause from the service of the city at such effective date, within thirty (30) days after his return to such service, execute an affidavit stating the facts required to be stated in the affidavit required by Section 3 of this ordinance.

Sec. 5. Each oath and affidavit required hereunder shall be taken, executed and signed before an officer authorized by law to administer oaths, and the jurat of such officer shall be affixed to the document so subscribed under the official seal of such officer. No officer or employee of the city shall require or receive the payment of any fee for administering any oath or affirmation provided for herein.

Sec. 6. The form of the affidavit required by Sections 3 and 4 hereof shall be prepared by the City Clerk. The City Clerk shall secure and maintain a supply of printed forms of the said affidavit and of the oath required by Sections 1 and 2 hereof, and shall furnish such forms as may be necessary to officers and employees of the city, to the Board of Civil Service Commissioners and to the heads of the departments of the city.

Sec. 7. The oaths and affidavits required hereby to be executed by officers and employees of the city who are appointed or employed under the provisions of Article IX of the City Charter shall be filed with the Board of Civil Service Commissioners and shall be a part of the officer's

or employee's personnel record on file with the said board. All other oaths and affidavits required hereunder shall be filed with the City Clerk.

Sec. 8. It shall be the duty of each appointing power to require each officer or employee to execute and file an oath and affidavit as required hereby.

* * * * * * * * *

IV.

An act to add Chapter 8 to Division 4, Title 1, of the Government Code, relating to an oath or affirmation of allegiance for civil defense workers and public employees, declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

SECTION 1. Chapter 8 is added to Division 4, Title 1 of the Government Code, to read:

CHAPTER 8. OATH OR AFFIRMATION OF ALLEGIANCE FOR CIVIL DEFENSE WORKERS AND PUBLIC EMPLOYEES.

3100. It is hereby declared that the defense of the civil population during the present state of world affairs is of paramount state importance requiring the undivided attention and best efforts of our citizens. In furtherance of such defense and in the exercise of police power of the State in protection of its citizens, all public employees are hereby declared to be civil defense workers subject to such civilian defense activities as may be assigned to them by their superiors or by law.

3101. For the purpose of this chapter the term "civil defense worker" includes all public employees and all volunteers in any civilian defense organization accredited by the State Disaster Council. The term "public employees" includes all persons employed by the State or any county, city, city and county, state agency or public district, excluding aliens legally employed.

3102. Subject to the provisions of Section 3 of Article XX of the Constitution, all civil defense workers shall within the first 30 days of employment take and subscribe to the oath or affirmation required by this chapter.

3103. The oath or affirmation required by this chapter is as follows:

"I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

"And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of

the United States or of the State of California by force or violence or other unlawful means except as follows:

.....

.....

(If no affiliations, write in the words, 'No Exceptions')

and that during such time as I am a member or employee of the.....I will not advocate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means."

(name of public agency)

3104. The oath or affirmation may be taken before any officer authorized to administer oaths.

No fee shall be charged by any person before whom the oath or affirmation is taken and subscribed.

3105. The oath or affirmation of any civil defense worker of the State shall be filed with the State Personnel Board within 30 days of the date on which it is taken and subscribed.

The oath or affirmation of any civil defense worker of any county shall be filed in the office of the county clerk of the county.

The oath or affirmation of any civil defense worker of any city shall be filed in the office of the city clerk of the city.

The oath or affirmation of any civil defense worker of any other agency or district shall be filed with such officer or employee of the agency or district as may be designated by such agency or district.

3106. Compliance with this chapter shall, as to state employees, be deemed full compliance with Chapter 4,

Part 1, Division 5, Title 2 of this code, requiring taking of oaths by state employees.

3107. No compensation nor reimbursement for expenses incurred shall be paid to any civil defense worker by any public agency unless such civil defense worker has taken and subscribed to the oath or affirmation required by this chapter. It shall be the duty of the person certifying to public pay rolls to ascertain and certify that such civil defense worker has taken such oath or affirmation.

3108. Every person who, while taking and subscribing to the oath or affirmation required by this chapter, states as true any material matter which he knows to be false, is guilty of perjury, and is punishable by imprisonment in the state prison not less than one nor more than 14 years.

3109. Every person having taken and subscribed to the oath or affirmation required by this chapter, who while in the employ of, or service with, the State or any county, city, city and county, state agency, public district, or civilian defense organization advocates or becomes a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States by force or violence or other unlawful means, is guilty of a felony, and is punishable by imprisonment in the state prison not less than one or more than 14 years.

Sec. 2. Subject to the provisions of Section 3 of Article XX of the Constitution, all persons designated in Chapter 8, Division 4, Title 1, of the Government Code as civil defense workers, on the effective date of this act shall, within 30 days, take and subscribe to the oath or affirmation required by Chapter 8, Division 4, Title 1,

of the Government Code. Any public employee who is on authorized leave on the thirtieth day after the effective date of this act shall take and subscribe said oath or affirmation within 30 days of his return to work.

Sec. 3. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Sec. 4. This act is an urgency measure necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

During the present emergency in world affairs loyalty and allegiance to the United States and the principles for which it stands are of utmost importance. Immediate assurance that persons in civil defense are loyal to this government and are not in fact advocates of its overthrow by force or violence is essential to the well-being of the State and Nation and the confidence of the people. It is therefore necessary that this act take effect immediately.

V.

GOVERNMENT CODE OF CALIFORNIA, SECTION 1028.

"Sec. 1028. *Advocating overthrow of government cause for dismissal.* It shall be sufficient cause for the dismissal of any public employees including teachers in the public schools or any state supported educational institution when such public employee or teacher advocates or is a

member of an organization which advocates overthrow of the Government of the United States or of the State, by force, violence, or other unlawful means." [Stats. 1947, ch. 1418, sec. 1.]

VI.

Military and Veterans Code of California, Sec. 616.

"Sec. 616. *Display of emblem of opposition to organized government.* Any person who displays a red flag, banner, or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building, or window as a sign, symbol, or emblem of forceful or violent opposition to organized government or as an invitation or stimulus to anarchistic action or as aid to propaganda that advocates by force or violence the overthrow of government is guilty of a felony." [Stats. 1935, page 378.]

VII.

Act 8428. California Syndicalism and Sabotage Law.

(Statutes of California 1919, page 281)

"An act defining criminal syndicalism and sabotage, prescribing certain acts and methods in connection therewith and in pursuance thereof and providing penalties and punishments therefor.

"Section 1. *'Criminal syndicalism' defined.* The term 'criminal syndicalism' as used in this act is hereby de-

fined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

"Sec. 2. *Unlawful acts: Penalty.* Any person who: 1. By spoken or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

"2. Willfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or

"3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising, criminal syndicalism; or

"4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society,

group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; or

"5. Willfully by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

"Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than fourteen years.

"Sec. 3. *Constitutionality of act.* If for any reason any section, clause or provision of this act shall by any court be held unconstitutional then the legislature hereby declares that, irrespective of the unconstitutionality so determined of such section, clause or provision, it would have enacted and made the law of this state all other sections, clauses and provisions of this act.

"Sec. 4. *Urgency clause.* Inasmuch as this act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this state advocating, teaching and practicing criminal syndicalism, this act shall take effect upon approval by the governor."

VIII.

TITLE 5 OF THE CORPORATIONS CODE OF THE STATE OF CALIFORNIA.

"Subversive Organization Registration Law."

"Sec. 35000. *Short title.* This title may be cited as the Subversive Organization Registration Law.

"Sec. 35001. *Purpose of title.* This title is e acted in the exercise of the police power of this State for the protection of the public peace and safety by requiring the registration of subversive organizations which are conceived and exist for the purpose of undermining and eventually destroying the democratic form of government in this State and in the United States.

"Sec. 35002. *'Subversive organization' defined.* As used in this title, 'subversive organization' means every corporation, association, society, camp, group, bund, political party, assembly, and every body or organization composed of two or more persons or members, which comes within either or both of the following descriptions:

"(a) Which directly or indirectly advocates, advises, teaches, or practices, the duty, necessity, or propriety of controlling, conducting, seizing, or overthrowing the Government of the United States, of this State, or of any political subdivision thereof by force or violence.

"(b) Which is subject to foreign control as defined in Section 35003.

* * * * * * * * *

"Sec. 35100. *Information and documents to be filed.* Every subversive organization in existence on September 13, 1941, shall within 30 days after that date, and every

subversive organization thereafter organized shall within 10 days after its organization, file with the Secretary of State, on such forms and in such detail as he may prescribe, the following information and documents:

"(a) A complete and detailed statement subscribed, under oath, by all of its officers, showing all of the following:

"(1) Its name and post-office address.

"(2) The names and addresses of all its branches, chapters, and affiliates.

"(3) The names, nationalities, and residence addresses of its officers and members, and the qualifications required for membership in it.

"(4) The nature and extent of its existing and proposed aims, purposes, and activities.

"(5) The times and places of its meetings.

* * * * * * * * *

"(b) A true copy, certified by all of its officers, of all of the following:

"(1) Its charter, article of association, or constitution, and its by-laws, rules and regulations.

"(2) Its oath, affirmation, or pledge of membership, if any.

"(3) Each agreement, resolution, and other instrument or document relating to its organization, powers, and purposes and the powers and duties of its officers and members.

"(4) Each book, pamphlet, leaflet, or other printed, written, or illustrated matter directly or indirectly issued or distributed by it or in its behalf, or to or by its members with its knowledge, consent, or approval.

* * * * * * * * *

"(c) A description of the uniforms, badges, insignia, or other means of identification prescribed by it, and worn or carried by its officers or members, or any of such officers or members.

"(d) In case it is subject to foreign control, a statement of the manner in which it is so subject.

* * * * * * * * *

"Sec. 35103. *Statement of new members.* Every subversive organization shall at least once in each period of six months file with the Secretary of State a statement subscribed under oath by all of its officers showing the names and residence addresses of all persons who have been admitted to membership during that period or, if no members have been admitted during that period, a statement to that effect similarly subscribed.

* * * * * * * * *

"Sec. 35302. *Membership in and attending meeting of organization.* Any person who becomes or remains a member of any subversive organization, or attends a meeting thereof, with knowledge that the organization has failed to comply with any provision of this title, is guilty of a misdemeanor punishable by fine of not less than ten dollars ($10) nor more than one thousand dollars ($1,000), or by imprisonment in the county jail for not less than 10 days nor more than one year, or by both."

IX.

TITLE 18, U. S. C., SECS. 2381-2385, INC.

"Sec. 2381. *Treason.*

"Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined not less than $10,000; and shall be incapable of holding any office under the United States.

"Sec. 2382. *Misprision of treason.*

"Whoever, owing allegiance to the United States and having knowledge of the commission of any treason against them, conceals and does not, as soon as may be, disclose and make known the same to the President or to some judge of the United States, or to the governor or to some judge or justice of a particular State, is guilty of misprision of treason and shall be fined not more than $1,000, or imprisoned not more than seven years, or both.

"Sec. 2383. *Rebellion or insurrection.*

"Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.

"Sec. 2384. *Seditious conspiracy.*

"If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof,

or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than $5,000 or imprisoned not more than six years, or both.

"Sec. 2385. *Advocating overthrow of Government.*

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

"Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

"Shall be fined not more than $10,000, or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction."

Service of the within and receipt of a copy thereof is hereby admitted this.....day of April, A. D. 1951.

4-19-51—30

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.
No. 453.

RAY H. GARNER, *et al.*,

Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES, *et al.*,

Respondents.

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION.
(On Behalf of Petitioners.)

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SUBJECT INDEX

PAGE

Prefatory statement 1

I.

The responsibility of effectuating and implementing the policy and function of government implies not only the power but the obligation to employ personnel whose qualifications will ensure the proper discharge of that responsibility 3

II.

Notwithstanding such obligation, the government in establishing qualifications for public employment is limited in the exercise of its discretion by two clearly established principles: (A) The qualifications must bear a reasonable relation to the type of employment offered; (B) The State, or an instrumentality thereof, cannot directly or indirectly deprive any person of the rights guaranteed to him by the First and Fourteenth Amendments 4

III.

The oath in question neither in scope nor application can reasonably be said to prescribe a qualification necessary to the proper discharge of the employment functions of those to whom it applies 7

IV.

The ordinance on its face restricts freedom of speech and association 10

V.

The sanctions attendant upon the enforcement of this order subject it to the constitutional requirement that it be narrowly drawn to meet the specific evil to be remedied 13

Conclusion 14

TABLE OF AUTHORITIES CITED

CASES	PAGE
American Communications Association v. Douds, 339 U. S. 382	9
Brown v. Russell, 166 Mass. 14, 32 L. R. A. 253	5
Curtis, Ex parte, 106 U. S. 232	4
Fink v. Finnegan, 270 N. Y. 356, 1 N. E. 2d 462	5
Frost v. Railroad Commission of California, 271 U. S. 583	6
Haub v. Tuttle, 80 Cal. App. 561, 251 Pac. 925	5
Hill v. Wallace, 259 U. S. 44	6
Hurd v. Hodge, 334 U. S. 24	6
Joint Anti-Fascist Refugee Committee v. Clark, 177 F. 2d 79	5
Kapel v. United States, 132 F. 2d 902	6
Kordel v. United States, 335 U. S. 345	13
Kunz v. New York, 95 L. Ed. (Adv. Ops.) 241	2
Marsh v. Alabama, 326 U. S. 501	6
Maxwell v. Civil Service Commission, 169 Cal. 336	3
Mitchell case, 330 U. S. 75	12
Murdock v. Pennsylvania, 319 U. S. 105	13
People ex rel. Lane v. Lindblom, 215 Ill. 58, 74 N. E. 73	5
Screws v. United States, 325 U. S. 91	6
Sheehan v. Scott, 145 Cal. 684	3
Sloat v. Board of Examiners of Bd. of Education of City of New York, 274 N. Y. 367, 9 N. E. 2d 12	5
Steward Machine Co. v. Davis, 301 U. S. 548	6
Terminiello v. Chicago, 337 U. S. 1	10
Tolman et al. v. Robert M. Underhill et al. (3d Civ. No. 7946, Cal., Third Appellate Dist, April 5, 1951)	15
United Public Workers of America v. Mitchell, 330 U. S. 75	4

PAGE

United States v. Butler, 297 U. S. 1 6

United States v. Curtis, 12 Fed. 824 3

United States v. Gaskin, 320 U. S. 527 13

MISCELLANEOUS

1 De Tocqueville, Democracy in America, Chap. 12 11

2 De Tocqueville, Democracy in America, Chap. 7 11

26 Opinions of Attorney General (1906), p. 363 3

26 Opinions of Attorney General (1907), p. 502 3

Report of President's Committee on Civil Rights, p. 5 (U. S. Printing Office, Washington, D. C., 1947) 14

Yankwich, Supremacy of the Law, p. 108 16

Yankwich, The Nature of Our Freedom, and Interpretation of Our Constitutional Heritage (1950), p. 30 16

Yankwich, The Nature of Our Freedom, and Interpretation of Our Constitution Heritage (1950), p. 80 15

STATUTES

Civil Service Regulations (5 U. S. C. A., Sec. 631) 3

Los Angeles City Ordinance No. 94004, Sec. 1 7

United States Constitution, Fourteenth Amendment 2, 5, 6, 12

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AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION.*

Prefatory Statement.

The passage of the loyalty order for city employees, City Ordinance No. 94004, by the Council of the City of Los Angeles on October 21, 1948, followed the pattern of action of governmental bodies throughout California and the nation. This widespread manifestation of legislative action has aroused the interest and concern of thinking people everywhere. The ordinance raises many issues, and to the grave doubts as to its wisdom are added even greater doubts as to its legality.

Because of the serious constitutional issues involved, on behalf of the American Civil Liberties Union, Southern California Branch, we desire to present to the Court for

*On behalf of petitioners.

its study and consideration our position as to the validity of loyalty oath requirements in general and as to this ordinance in particular.

For the purposes of the argument, we accept the facts as set forth in the pleadings and recited in the petition for certiorari and briefs heretofore filed in opposition.

It is our considered opinion and position that, fundamental to any resolution of the problems raised by loyalty oaths which are made a condition of public employment is the recognition of the function of the Bill of Rights as the equilibruim between maximum freedom and power for those occupying public office as "government" to properly execute their trust, on the one hand, and the maximum freedom of the individual to exercise his right to unfettered speech, thought and action, on the other.

We feel that the oath in question shows a clear invasion of the individual's freedom without the necessary commensurate showing of its need in the execution of the public trust and that as a result of this lack of balance the oath should be struck down as a violation of the 14th Amendment. As Mr. Justice Jackson said in *Kunz v. New York* (1951), 95 L. Ed., Advance Opinion 241, 244, speaking of another aspect of this same problem:

> "Addressing himself to the subject 'Authority and the Individual' one of the keenest philosophers of our times observes:
>
> "'*The problem, like all those with which we are concerned, is one of balance;* too little liberty brings stagnation, and too much brings chaos." (Emphasis added.)

I.

The Responsibility of Effectuating and Implementing the Policy and Function of Government Implies Not Only the Power but the Obligation to Employ Personnel Whose Qualifications Will Ensure the Proper Discharge of That Responsibility.

We cannot, either in logic or principle, take issue with the position of the respondents that a governmental body, agency or other instrumentality has the right to set up tests and qualifications of various kinds for those who seek service with it. In the sense that it is charged with the duty of selecting those persons best qualified to serve its purposes, there can be no quarrel with the authority of a governmental body, state or federal, to formulate standards applicable to all applicants for public employment. This principle was early established and given judicial sanction in the enforcement of the Civil Service Regulations established by the Congress of the United States. [Title 5 U. S. C. A., Sections 631, *et seq.*, and see 26 Opinions of the Attorney General 363 (1906) and 26 Opinions of the Attorney General 502 (1907). And this principle is equally true on the State level. *Sheehan v. Scott*, 145 Cal. 684, 687 (1905); *Maxwell v. Civil Service Commission*, 169 Cal. 336, 338 (1915).]

And that these standards extend also throughout the term of service was reiterated in *U. S. v. Curtis* (1882 C. C. N. Y.), 12 Fed. 824, where the Court observed:

> "The power to prohibit acts of officers as employees which are incompatible with the proper discharge of their duties, or which impair the efficiency or tend to demoralize the public service, is essential to promote the end and object of Government; and this power resides in the legislative department of the Government."

II.

Notwithstanding Such Obligation, the Government in Establishing Qualifications for Public Employment Is Limited in the Exercise of Its Discretion by Two Clearly Established Principles: (A) The Qualifications Must Bear a Reasonable Relation to the Type of Employment Offered; (B) The State, or an Instrumentality Thereof, Cannot Directly or Indirectly Deprive Any Person of the Rights Guaranteed to Him by the First and Fourteenth Amendments.

This Court has recently affirmed the principle that the Federal Government in establishing limitations and qualifications upon federal public employment is bound by the rule of reasonableness. In *United Public Workers of America v. Mitchell*, 330 U. S. 75, 101 (1946), the Court said:

> "For regulation of employees, it is not necessary that the act regulated be anything more than an act *reasonably* deemed by Congress to interfere with the efficiency of the public service." (Emphasis added.)

The Court also adopted language from *Ex parte Curtis*, 106 U. S. 232, 235 (1882), to support its position in validating certain limited restrictions on political activities of Federal employees to the effect that:

> "The evident purpose of Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly, such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration *does not come fairly within the legitimate means* to such an end." (Emphasis added.)

And compare the dissent of Edgerton, J., in *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F. 2d 79, 88 (C. A. D. C. 1949).

That qualifications on employment and tenure at the state level must also bear a reasonable relation to the particular ends sought to be achieved, finds expression in innumerable cases:

Haub v. Tuttle, 80 Cal. App. 561, 251 Pac. 925 (1926);

Sloat v. Board of Examiners of Bd. of Education of City of New York, 274 N. Y. 367, 9 N. E. 2d 12 (1937);

Fink v. Finnegan, 270 N. Y. 356, 1 N. E. 2d 462 (1936);

Brown v. Russell, 166 Mass. 14, 32 L. R. A. 253 (1896);

People ex rel. Lane v. Lindblom, 215 Ill. 58, 74 N. E. 73 (1905).

It follows of necessity that where a public body imposes a qualification for employment to which objection is voiced, the courts are bound to inquire as to whether this new qualification reflects a necessary relation to the standards reasonably required for the proper fulfillment of the tasks to be done.

Again, this Court has stated that neither the state nor any instrumentality thereof can consistently with the intendment of the Fourteenth Amendment pass any law, regulation or order which in its effect, either directly or *indirectly*, deprives any person of rights guaranteed to him by that amendment.

Hill v. Wallace, 259 U. S. 44 (1922);
U. S. v. Butler, 297 U. S. 1 (1935);
Steward Machine Co. v. Davis, 301 U. S. 548 (1939).

The courts have gone even further and have said that in certain instances even the withholding of a privilege for the purpose of accomplishing the surrender or destruction of a constitutional right constitutes a denial of due process.

Frost v. Railroad Commission of California, 271 U. S. 583 (1925);
Kapel v. U. S., 132 F. 2d 902 (C. C. A. 4, 1943);
Hurd v. Hodge, 334 U. S. 24 (1948);
Marsh v. Alabama, 326 U. S. 501 (1946).

And it has been said that for any branch of the government to deprive a person of basic rights without the authority of law violates due process, no matter how indirect the injury may be and no matter what form the governmental action may take.

Screws v. U. S., 325 U. S. 91 (1944).

It follows then that any act of the State or an instrumentality thereof is subject to strict scrutiny to determine (a) whether its effect is to deprive any person, either directly or indirectly, of rights guaranteed by the Fourteenth Amendment; (b) whether it is withholding a privilege for the purpose of accomplishing the surrender or destruction of a constitutional right; or (c) whether in the guise of propriety and regardless of the indirect nature of the injury there is infringement of basic freedoms guaranteed by the Bill of Rights.

III.

The Oath in Question Neither in Scope nor Application Can Reasonably Be Said to Prescribe a Qualification Necessary to the Proper Discharge of the Employment Functions of Those to Whom It Applies.

The ordinance in question is of a dual nature in that it requires both an oath and an affidavit.* It requires an oath that the person did not advocate or was not a member of an organization which advocates the forcible over-

---

[1]Section 1. Every person who is hereafter elected or appointed to an office or position in the service of the City of Los Angeles must, before entering upon the duties of his office or position, take and subscribe to the following oath:

I,.....,
do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America and the State of California, and will support and defend the Constitution and laws of the United States of America and of the State of California and the laws of the City of Los Angeles against all enemies, foreign and domestic. I further swear (or affirm) that I do not advise, advocate or teach, and have not within the period beginning five (5) years prior to the effective date of the ordinance requiring the making of this oath or affirmation, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California and that I am not now and have not, within said period, been or become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of California. I further swear (or affirm) that I will not, while I am in the service of the City of Los Angeles, advise, advocate or teach, or be or become a member of or affiliated with any group, association, society, organization or party which advises, advocates or teaches, or has within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California, that I will well and faithfully discharge the duties of my office or employment in the service of the City of Los Angeles and that I take this whole obligation freely, without any mental reservation or purpose of evasion, So Help Me God.

throw of Government in the five years preceding the taking of the oath nor that he engages in such activity at the time of taking the oath. It requires an affidavit that he will not engage in such activity while he is an employee of the City of Los Angeles.

The oath and affidavit cover *every employee* of the City regardless of his position or the nature of his duties. We contend that such broad application manifests a complete lack of purpose or intent to reach any specific evil, to fill any particular gap in the present tests applicable to *all public employees.*

Nowhere is it shown that certain employees are in so-called "policy making" positions where it might be said that their views with respect to Government must be known to determine their aptitude and qualifications for such responsibility. Nowhere is it shown that certain employees are in "security" positions where the same test might have relevance, or for that matter any other position of such a nature that it is incumbent upon those charged with the duties of Government to ascertain the employee's attitude toward our institutions of Government in order to properly evaluate their fitness for a particular position.

On the contrary, the oath and affidavit are made applicable to all employees who draw their salary from the public authority, whether they be the Chief of Police, a street cleaner, or sprayer of insecticide on City property. Can it be validly argued that a person's attitude to Government and its forcible overthrow bears a reasonable relation to his fitness for discharging a majority of these

tasks? And yet the law clearly requires that this qualification is supportable only if it does bear such relation.

Again, the oath goes back five years in its search for opinion and activity, apparently in the theory that past action indicates present disposition. But this has never been the presumption in law where proof of present activity results in criminal or economic sanctions under the force of law. This Court has recently affirmed this point in *American Communications Association v. Douds,* 339 U. S. 382, 414 (1949), where it pointed out in sustaining the non-Communist affidavit requirement of the Taft-Hartley Act.

> "Here the intention is to forestall future dangerous acts; *there is no one who may not by a voluntary alteration of the loyalties which impel him to action became eligible to sign the affidavit.*" (Emphasis added.)

Implicit in such a holding is the recognition of the fact that men can and do in the very nature of things change their minds and opinions and as result lose their initial disqualification to participate in the deliberations, actvities or fruits of Democratic Government. Nowhere in this Ordinance is there such a recognition.

IV.

The Ordinance on Its Face Restricts Freedom of Speech and Association.

There can be little argument that this ordinance clearly restricts both freedom of speech and association.

While freedom of speech is not absolute, the limitations have been confined to a narrow area whose limitation finds excellent expression in the opinion of Mr. Justice Douglas in *Terminiello v. Chicago,* 337 U. S. 1 (1949), where he said, at page 4:

> "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. *That is why freedom of speech, though not absolute,* Chaplinsky v. New Hampshire, *supra* (315 U. S. pp. 571, 572, 86 L. Ed. 1034, 1035, 62 S. Ct. 766), *is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest."* (Emphasis added.)

Nowhere in the brief of the City in opposition to certiorari is it argued that public employment of all or a few of those persons who advocate the forcible overthrow of Government would constitute a clear and present danger or substantive evil.

The same argument holds equally true of the abridgment by this ordinance of freedom association. In this connection, we would like to draw the Court's attention to words written over 150 years ago by the astute historian De-

Tocqueville in his "Democracy in America," Vol. 1, Chap. 12 and Vol. II, Chap. 7, declaring that:

> "When some kinds of association are prohibited and others allowed, it is difficult to distinguish the former from the latter beforehand. *In this state of doubt,* men abstain from them altogether, and a sort of public opinion proves current, which tends to cause any association whatsoever to be regarded as a bold and almost illicit enterprise. . . . When the members of a community are allowed and accustomed to combine for all purposes, they will combine as readily for the lesser as for the more important ones, but if they are only allowed to combine for small affairs, they will be neither inclined nor able to effect it."

This quotation from DeTocqueville is particularly apropos of the oath and ordinance in question, for here the type of proscription, which is both retrospective and prospective in nature, places any individual in the community in jeopardy with respect to the opportunity for, or retention of, public employment, by his association with any organization which is, was or might become in the future an illegal organization within the meaning of the ordinance. In this state of affairs, to paraphrase DeTocqueville, all members of the community at large who may at some time wish to engage in public service or become public employees would abstain from every organization of any character whatsoever for fear that either sometime in the past or presently or sometime in the future such organization would be tainted with the principles prescribed by this ordinance.

Finally, it might be pointed out in connection with this aspect of the problem that it is no answer to the delimitation of civil rights to say that a person who applies for public employment consents to relinquishing certain rights guaranteed to him by the Fourteenth Amendment. True, a person who goes to work for a private employer may be asked to, and in many instances does, give up freedoms which we deem to be essential and natural under our form of government, but this is not true in the field of public employment for the reason that a public employer is an instrumentality of the state, and as an instrumentality of the state he is bound by the restrictions of the Fourteenth Amendment. He cannot either directly or indirectly by any means whatsoever subvert the obligations of the Fourteenth Amendment, which obligations are not binding upon any private employer.

As Mr. Justice Douglas stated it in his dissent in the *Mitchell* case (330 U. S. 75, 124):

> "The difficulty lies in attempting to preserve our democratic way of life by measures which deprive a large segment of the population of all political rights except the right to vote. *Absent coercion, improper use of government position or government funds, or neglect or inefficiency in the performance of duty, federal employees have the same rights as other citizens under the Constitution.*" (Emphasis added.)

V.

The Sanctions Attendant Upon the Enforcement of This Order Subject It to the Constitutional Requirement That It Be Narrowly Drawn to Meet the Specific Evil to Be Remedied.

We would like to direct the Court's attention to the fact that this ordinance by its very nature calls for severe sanctions in its application and so is practically penal in nature. Additionally, it clearly invades civil liberties protected by the Fourteenth Amendment. This Court has consistently held that in either situation the statute, regulation or ordinance must be narrowly drawn to meet and cover a specific problem, and if not so drawn, it must be struck down.

U. S. v. Gaskin, 320 U. S. 527 (1943);
Kordel v. U. S., 335 U. S. 345 (1948);
Murdock v. Penna., 319 U. S. 105 (1942).

Not only is the ordinance in question entirely too broad in its classification of persons covered, but it suffers from an even greater vice in that it proscribes an area which defies any reasonable understanding or awareness of, namely the area of affiliation. The ordinance purports to deny employment, to cancel civil service tenure, and in effect compel the relinquishment of basic freedoms, where in the sole discretion of a public official there has been a determination, not that a person has advocated or belonged to an organization which advocated, but was *affiliated* with such an organization which so advocated. Every present or prospective employee then is faced at his peril with the almost impossible task of determining what constitutes affiliation in the mind of a public official. Where in all of this is there adherence to the rule of "narrowly drawn, clearly defined" legislation which imposes sanctions or transgresses civil rights?

Conclusion.

Our argument has been addressed to the outline of well established legal and constitutional bases for condemning the ordinance in question. However, in the decision of this case, there must be invoked a broader and more fundamental approach to the problems involved. Our times, and indeed the present moment of history, requires consideration anew of those methods whereby free men construct and maintain the institutions under which they can live together. In a context not so pressing, a group of earnest citizens contributed the following:

> "The men who founded our Republic, as those who have built any constitutional democracy, faced the task of reconciling personal liberty and group authority, or of establishing an equilibrium between them. In a democratic state we recognize that the common interests of the people must be managed by laws and procedures established by majority rule. But a democratic majority, left unrestrained, may be as ruthless and tyrannical as were the earlier absolute monarchs. Seeing this clearly, and fearing it greatly, our forefathers built a constitutional system in which valued personal liberties, carefully enumerated in a Bill of Rights, were placed beyond the reach of popular majorities. Thus the people permanently denied the federal government power to interfere with certain personal rights and freedoms."
>
> Report of President's Committee on Civil Rights, U. S. Printing Office, Washington, 1947, at page 5.

There must be considered also that the challenge to our Democratic approach which has gained great support throughout the world was introduced into modern political thinking by the Bolshevik Revolution in Russia. The en-

forcement of political orthodoxy was in our time first made a major tenet of government by the Communist Party of the USSR. It was later used effectively by the Fascists of Italy and reached its ascendency in the Fuhrer-ship concept and the Nazi Dictatorship of Hitler, with its resulting violation of international and national rights, its practice of genocide and its degredation of the individual.[2]

As has been recently and well said by a California Court,[3] the loss of those rights established under our system of constitutional law may come with the slow process of erosion. Indeed, the slighter the invasion the more limited the area, the greater the danger, since before the less sensitive eye the foundation principles may thus more easily and readily be worn away.

The ordinance here before the Court may be said to be symptomatic of the demand for orthodoxy on the part of

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[2]See, The Nature of Our Freedom, and Interpretation of Our Constitutional Heritage (1950), by Leon R. Yankwich, Judge of the U. S. District Court, Southern District of California, page 80 *et seq.*, and citations there given.

[3]In *Tolman, et al. v. Robert M. Underhill* as Secretary and Treasurer of the Regents of the University of California, *et al.* (3 Civ. No. 7946. State of California, Third Appellate District. Decided April 5, 1951; official citation not available), the Court ruled invalid under the California and Federal Constitutions a "test oath," somewhat akin to the ordinance here in question, prescribed by the Regents of the University of California for professors and employees of the University. Pertinent here is the following from its opinion:

> "While this Court is mindful of the fact that the action of the Regents was at the outset undoubtedly motivated by a desire to protect the University from the influences of subversive elements dedicated to the overthrow of our constitutional government and the abolition of our civil liberties, we are also keenly aware that equal to the danger of subversion from without by means of force and violence is the danger of subversion from within by the gradual whittling away and the resulting disintegration of the very pillars of our freedom."

the majority of our people. It is a first, small encroachment upon the residuum of those individual freedoms and rights upon which political and religious liberty are premised. It strikes at the integrity of the individual in a manner not permitted under our Constitution, not required in the necessary performance of Municipal Government, and in a form reminiscent of the test oath and witch-hunt persecutions of the past. As Judge Yankwich put it (*op. cit.* p. 30):

> "The doctrine of limited sovereignty or the limited state maintained by that government *is bound by the law of the land and is not above it.* According to this theory each citizen has certain rights of which he cannot be deprived by the government—either state or federal—or by a majority."

See also his discussion of "Supremacy of the Law," page 108, *et seq.*

The judgment of the State Court sustaining the validity of this ordinance should be reversed.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this.....day of April, A. D. 1951.

4-13-51—60

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IN THE

Supreme Court of the United States

October Term, 1950
No. 453

RAY H. GARNER, HARRY BECKERMAN, AIDA BELDNER, JOHN B. BROWN, CARRIE L. DICK, MARY E. GRUNEWALD, EUGENE HALLETT, MARGARET B. HASKELL, EDWARD HAVENS, CORNELIUS LAWRENCE, VERA MANN, OLA ROSS PACIFICO, DANA PLATT, EUGENE REED, FRANCES SCHWARTZ, WILLARD SMART, FRANK TORREANO,

Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; CLARENCE J. DERRICK, JOSEPH O. DONOVAN, LOUIS M. DREVES, FRANK GILLELEN, EDWARD L. TAYLOR and MILTON OFFNER, as Members of the Board of Public Works of the City of Los Angeles, BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; SAMSON A. LINDAUER, JUSTIN W. GILLETTE, CHARLES E. ARNN, RANSOM M. CALLICOTT, and MRS. IDA S. LAZARD, as Members of the Board of Civil Service Commissioners of the City of Los Angeles; DAN O. HOYE, City Controller of the City of Los Angeles; THE CITY OF LOS ANGELES, a Municipal Corporation,

Respondents.

PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED.

Cases.	PAGE
American Communications Ass'n v. Douds, 339 U. S. 382	7, 11
Cummings v. Missouri, 4 Wall. 277	4, 5, 6, 8
Dent v. West Virginia, 129 U. S. 144	8, 9
Garland, Ex parte, 4 Wall. 330	4, 5, 6
Garner v. Board of Public Works, 98 Cal. App. 2d 493, 220 P. 2d 958	2
Gerende v. Board of Supervisors, 341 U. S. 50	2, 7, 11
Hawker v. New York, 170 U. S. 189	8
Joint Anti-Fascist Refugee Committee v. McGrath, 95 L. Ed. (Adv. Op.) 556	10
Maggio v. Zeitz, 333 U. S. 56	4
Minersville v. Cobitis, 310 U. S. 586	6
Musser v. Utah, 333 U. S. 95	4
People v. Steelik, 187 Cal. 361, 203 Pac. 78	2, 3
United States v. Lovett, 328 U. S. 303	4, 6
West Virginia v. Burnette, 319 U. S. 624	7, 11

Statutes	
United States Constitution, Art. I, Sec. 10	4
United States Constitution, First Amendment	10

Textbooks	
67 Corpus Juris Secundum, Sec. 2, p. 4	3

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Respondents.

PETITION FOR REHEARING.

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully urge this Court to grant them a rehearing upon the decision and judgment rendered in this cause on June 4, 1951.

1. Procedurally, the majority decision of this Court appears to have overlooked the fact that its interpretation

of the Ordinance, which the majority "felt justified in assuming," has not been embodied *into law*, that is, there is no state judgment which carries out the mandate of this Court and upon which the petitioners can rely or otherwise enforce.

The assumption by the majority of the Court that "scienter is implicit in each clause of the oath" because in a criminal case, *People v. Steelik*, 187 Cal. 361, 203 Pac. 78 (1921), the California Supreme Court imported "knowledge" into the literal text of a criminal syndicalism statute, does not appear to rest on a sound legal basis.

The instant case, in the first place, arose in a state jurisdiction. This is a local ordinance embodying an oath provision which has been construed broadly and without limitation by the courts of the State of California. (*Garner v. Board of Public Works*, 98 Cal. App. 2d 493, 220 P. 2d 958.) So far as the instant case is concerned, that construction will remain unmodified in law because of the affirmance of the judgment below. This is, of course, entirely different from the situation in *Geronde v. Board of Supervisors*, 341 U. S. 50, where the highest court in the State of Maryland had construed the statute in a limited manner, which construction this Court affirmed. The petitioners in the *Geronde* case, therefore, had a judgment which they could enforce. The petitioners here have no such judgment.

In the second place, where in a criminal prosecution the word "knowingly" is imported into a governing statute and the indictment thereunder, the defendants' only injury, if any, is that he may be convicted on a charge under a statute which by its original indefiniteness left him unapprised of what he could or could not do. Other than that, the defendant need do nothing except to hold the prosecu-

tion to the additional burden which the law has imposed. But the ordinance here compels initially an affirmative act on the part of the petitioners, and an affirmative act of a solemn nature. It requires that an *oath* be taken, that a person *swear* that he has not engaged in certain proscribed activities. "An oath is an appeal by a person to God to witness the truth of what he declares, and an imprecation of Divine punishment or vengeance on him if what he says is false, and its purpose is to secure the truth." 67 Corpus Juris Secundum, Sec. 2, p. 4. Under such circumstances, there would appear to be a lack of due process to compel a person to take an oath different in context from that which a majority of this Court "assumes" was intended by the language of the Ordinance. Especially is this true where objections to the oath originally were made on the basis of conscience.

In the third place, the majority of this Court has done more than import scienter into the oath. It has construed scienter as excluding "persons who during their affiliation with a proscribed organization were innocent of its purpose, or those who severed their relations with any such organization when its character became apparent, or those who were affiliated with organizations which at one time or another during the period covered by the Ordinance were engaged in proscribed activity but not at the time of affiant's affiliation." There is nothing in *People v. Steelik*, nor any other California decision, which intimate that such interpretations of the word "knowingly" will be read into the text of an oath provision. Unless, therefore, the decision of this Court is embodied into the judgment of the state court, there can be no certainty that the rights of the petitioners will be safeguarded. The resultant confusion may place additional and perhaps insuperable

burdens upon petitioners, requiring them to engage in additional litigation if the state courts and officials at any time take a different view of the nature of this Court's decision.

Without conceding the correctness of the majority's decision, it is therefore respectfully submitted that the judgment of the state court should have been reversed or vacated, with instructions to proceed consistent with the Court's opinion. Due deference to both state courts and lower federal courts have led constantly to this result in analogous cases. Compare, *Musser v. Utah*, 333 U. S. 95; *Maggio v. Zeitz*, 333 U. S. 56, 77. Such a judgment will at least entitle the petitioners to reinstatement until they are presented with a proper oath in conformity with this Court's opinion, at which time the rights of all parties to this dispute will have been delineated by the judgment of this Court as embodied in the judgment of the state court.

2. So far as the oath provision of the Ordinance is concerned, the majority opinion is contrary to the decision of this Court in *Cummings v. Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 330, and *United States v. Lovett*, 328 U. S. 303, as well as the express prohibitions of the Constitution (Article I, Section 10) considered in the light of history and the intendment of the founders of the nation.

The majority opinion reasons, in effect, that because the Charter amendment defined "standards of eligibility" in 1941, therefore the Ordinance is valid because it merely provides "administrative implementation" for the provisions of the Charter. As the record demonstrates, the Ordinance was not "administrative implementation" but "legislative implementation." It is the legislature which effected the discharge of petitioners and this not after an "administrative hearing," which was only a mask, but by

force of the legislative act itself. How did the legislature or any court of law know that these petitioners were "ineligible" under the Charter? It was not because of any accusation, evidence, hearing, or judgment. This Court has simply affirmed the assumption of the legislature that the petitioners were "ineligible" because they refused to sign a test oath. It is the legislature which deprived the petitioners here of their avocations without hearing. This Court by its judgment now affirms that legislative determination, asserting that the municipality is entitled to "loyalty" although no one, not even the City of Los Angeles, has ever alleged or proved that the petitioners were disloyal.

The error of the majority opinion, it is respectfully submitted, arises from the confusion of the question of *ex post facto* with the question of bill of attainder. The fact that the Charter was amended in 1941 while the oath provision, adopted in 1948, ran back to 1943, affects the question of *ex post facto*. In this respect, the Ordinance may not create ineligibility where eligibility existed before, but it does at least subvert the presumption of innocence and alter the rules of evidence. Compare, *Cummings v. Missouri*, 4 Wall. 277, 328. Insofar as bill of attainder is involved, however, whether prior conduct was criminal or innocent is not decisive. In the *Cummings* and *Garland* oaths, past criminal conduct—active rebellion to overthrow the government by force and violence—was involved. Indeed, in the case of Garland this could hardly be denied. Yet the oath which Cummings and Garland were compelled to take was held by this Court to be unlawful, and unlawful because "in all these cases there would be the legislative enactment creating the deprivation, without any of the ordinary forms and guards provided for the security

of the citizen in the administration of justice by the established tribunals" (p. 325). Of course all cases agree that the government may prescribe rational qualifications for employment. But until the decision herein, all cases have also agreed that deprivation of employment for past conduct is punishment, that in such cases the issue is one of disqualification, not qualification, and that such deprivation of employment by legislative act without process administered by other arms of government is attainder. To state that *United States v. Lovett, supra,* is distinguishable because no prior standards of eligibility had existed in that case is to overlook the fact that at no time prior to the *Lovett* decision was any "subversive" person, assuming the word is capable of definition, ever eligible for employment by the Government of the United States. The statute in the *Lovett* case was held unconstitutional, not because there were no prior standards of eligibility, but because named individuals were excluded from their chosen avocations by legislative act without judicial hearing. Clearly, the *Lovett* case is not distinguishable because in that case the persons were specifically named. This Court in the *Cummings* and *Garland* cases pointed out the fallacy of attempting to distinguish bills of attainder which named specific individuals and those which provided for test oaths. "The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character." *Ex parte Garland, supra,* p. 377.

3. While this Court sits the right of the citizen to be free from compulsory "loyalty" oath taking has been steadily retrogressing. It is a far cry from the position of Chief Justice Stone in *Minersville v. Cobitis* (310 U. S. 586), wherein the government was held to be without constitu-

tional power to demand that expression of loyalty implicit in the flag salute ceremony (a minority position which became this Court's majority view in *West Virginia v. Barnette,* 319 U. S. 624) to the recent *Douds* case wherein an oath as to present or future loyalty was upheld; and an even greater jump backwards has now been made, and right into the instant situation wherein an inquiry is allowed as to past loyalty. True this Ordinance reaches back only five years; but granted the initial power, why cannot government go back ten, fifteen or seventy-five years? And if this Court concedes this retrospective power to be constitutional, what then happens even to the narrow limitations imposed by *Geronde* (341 U. S. 56) and by *Douds?*

Fortunately, we have not yet in America come to the Hitlerian stage at which his inquisitors reached out to the great great grandparents of the accused to find the "taint" which justified the blacklisting of assumed anti-nazis. And therefore we urge this Court, before it is too late, to squarely answer the question involved in this Ordinance dealing particularly with past membership and past affiliation. We submit respectfully that it is no answer to say, as the majority here says, that "past conduct may well relate to present fitness." Can anyone seriously assert that what a tree trimmer may have advocated in the political arena five years ago may affect his present fitness to trim a tree, or that what a typist in the ordinary clerical posts may have taught four years ago, may well relate to her present fitness to type a letter as required by her supervisor? If so, then under all the authorities of this Court, this Ordinance would still be unconstitutional for then the state would be required to select that one of the many methods available to it to assure fitness of employees which impinges least upon constitutional rights otherwise existent.

And with respect to this Court's observation that "past conduct may well relate to present fitness" we ask this Court to reconsider, as we have, what was said in *Cummings v. Missouri;* for this was the precise argument made by the State of Missouri—and rejected by Mr. Justice Field notwithstanding that the past conduct there related to acts heinous as actual armed rebellion against the state. Could not past participation in an armed rebellion be said to relate more nearly to present fitness to serve the state, then past advocacy of the doctrine of rebellion? And yet the Supreme Court in *Cummings* threw over the loyalty oath. Is this Court not then reversing *Cummings* here, *sub silentio?*

The majority here relies upon *Hawker v. New York*, 170 U. S. 189 and upon *Dent v. West Virginia*, 129 U, S. 144. In *Hawker* the statute excluded from the practice of medicine those who had been *convicted* of abortion. Not only is there a direct relationship between the act of abortion and the right to practice medicine, but over and above this Hawker was not disqualified until *first* convicted; Hawker was not disqualified because he failed to take an oath; he was disqualified because he had had his day in Court and after trial had been found guilty. The state here does not contend that these petitioners ever had a trial to determine whether they were or were not members or advocates of the proscribed organizations or doctrines; they were disqualified only for failure to take the demanded oath, not because of proof of guilty advocacy or membership. The difference is the difference between democratic due process and autocracy—no more, no less.

Dent v. West Virginia, 129 U. S. 114, is even less apposite. There the state merely required those who would practice medicine to present credentials from accredited

medical schools. The reasonableness of the requirement is as patent as is the fact that disqualification there did not flow from a failure to take an oath, but rather from a failure to show evidence of a qualification germane to the calling. In *Dent* no special class was signalled out for discriminatory treatment, and no oath was utilized as the device to identify the group selected for punishment by a legislature without hearing.

4. As to the affidavit requirement, this Court apparently agrees that there is here a legislative imputation of disloyalty, but finds no constitutional infirmity since the Ordinance does not call for discharge in the event that the individual swears he was a member of the Communist Party or the Communist Political Association. But the majority of this Court holds that since 1943, persons who were members of organizations which forcibly advocated the overthrow of government were ineligible for office in the City of Los Angeles. Since the affidavit provision was enacted to "effectuate the objects" of the Charter, it can only mean that the legislature has "found" that the Communist Party and Communist Political Association advocate the proscribed doctrines, and that members of these two organizations are therefore ineligible to hold office. Under this Court's view of the record, and this was also the position of the City expressed in its brief and oral argument, no person who was a member of the two named organizations could work for the City. The Ordinance, in the light of the Charter, is therefore as much a bill of attainder as the oath provision itself.

Moreover, this Court appears to have overlooked the broad implications of its decision with respect to the affidavit provision. This affidavit deals with two *named* organizations and it is justified upon the ground that it is relevant to an inquiry into the "loyalty" of employees. Here are no general standards affecting all organizations. Here, guilt or the presumption of guilt—of disloyalty—has been imputed to two named organizations. This is clearly arbitrary and a usurpation by the legislature of judicial function. If the legislature can impute disloyalty to any organization with judicial hearing, why may not it impute such unlawfulness to a dozen or one hundred other organizations, political, economic or social? Compare *Joint Anti-Fascist Refugee Committee v. McGrath*, 95 L. Ed. Adv. 556. It is one thing for the municipality to proscribe membership in organizations generally which are unlawful; it is quite another thing for the legislature to proscribe membership in the "X", "Y" and "Z" organizations because the legislature believes membership in such named organizations to be incompatible with "loyalty."

Not only do such latter statutes disregard the doctrine of separation of powers, but they lay burdens on the exercise of First Amendment rights and coerce opinion by visiting discharge and stigma upon those who were and are members of such organizations. If, as this Court stated in *Dennis v. United States*, decided June 4, 1951, a legislature cannot "eradicate the free discussion of political theories" nor "destroy the traditional rights of Americans to discuss and evaluate ideas without fear of gov-

ernmental sanction," by what right did the Council of the City of Los Angeles "find" that certain named organizations were disloyal or presumptively disloyal, and that citizens were required, as relevant to a "loyalty" inquiry, to swear whether or not they had been members of such organizations? How can there be freedom of discussion if organizations and their members can be proscribed by legislative fiat without judicial trial?

5. The petitioners respectfully submit that all compulsory "loyalty orders" are inherently unconstitutional and that no decisive distinction exists between the situation presented here and that presented in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624. The loyalty oath here is not concerned with qualifications or fitness for office. It is avowedly aimed at compelling loyalty, at compelling adherence to organized government even where the existing structure of the government provides no means of peaceful and orderly change. There are no limits on this oath. Such a compulsory test oath of loyalty has no place on the American scene, past, present or future.

6. Such decisions as *Geronde v. Board of Supervisors*, 341 U. S. 56 and *American Communications Ass'n v. Douds*, 339 U. S. 382, are clearly distinguishable from the situation here. These petitioners are not *candidates for appointment* to office. They are not knocking at the door of the National Labor Relations Board. They are citizens who *occupy office* and as such are entitled to hold office, not as a matter of grace, but as a matter of legal right

under the Constitution. An *applicant* for a position in government employ may have narrow room to argue lack of due process, but a citizen who has met all requirements and obtained office has a right to invoke the guarantees which every citizen enjoys against governmental lawlessness, unless government is above the law.

The petition for rehearing should be granted.

Respectfully submitted,

CHARLES J. KATZ,
Counsel for Petitioners.

SAMUEL ROSENWEIN,
Of Counsel.

Certificate of Counsel.

I certify that this petition for rehearing is presented in good faith and not for delay.

CHARLES J. KATZ,
Counsel for Petitioners.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of June, A, D. 1951.

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IN THE

Supreme Court of the United States

October Term, 1950
No. 453

RAY L. GARNER, *et al.*,

Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES, *et al.*,

Respondents.

Respondents' Petition for Rehearing or Reconsideration and for Modification of the Opinion of the Court.

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SUBJECT INDEX

PAGE

History of the case 5

The respondents' administrative interpretation of the oath provisions of the ordinance 12

The effect of the judgment here upon the effectuation of the ordinance in the future 13

Conclusion 16

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Ainsworth v. Bryant, 34 Cal. 2d 465	5
American Communications Association v. Douds, 339 U. S. 382, 94 L. Ed. 925	13
Butterworth v. Boyd, 12 Cal. 2d 140	5
City of Grass Valley v. Walkinshaw, 34 Cal. 2d 595	5
Wilson v. Los Angeles County Civil Service Commission, 95 Cal. App. 2d 51, 212 P. 2d 265	6

STATUTES

California Constitution, Art. XI, Sec. 8	5
Government Code, Secs. 3100-3105	14
Los Angeles City Charter, Sec. 432	5
Los Angeles City Ordinance No. 94,004	5, 14

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Respondents.

Respondents' Petition for Rehearing or Reconsideration and for Modification of the Opinion of the Court.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

This matter is here on certiorari to the District Court of Appeal. The District Court of Appeal concluded that the petitioners stated no cause for the issuance of an alternative writ of mandate requiring the respondents to appear before the Superior Court and plead the facts upon which they based their refusals to restore the petitioners to the positions in the city's employ from which the petitioners asserted they had been discharged. Under the *judgment* of this Court, the order of the Superior Court is not disturbed.

The respondents agree with the statements in the *opinion* of this Court (1) that the requirement for the oath and the requirement for the affidavit are properly to be separately considered; (2) that "*scienter*, is implicit in each clause of the oath"; and (3) that the requirement of the oath as so construed, and the requirement of the affidavit, is each separately a validly required condition of public employment under the circumstances here presented.

However, in its opinion this Court further says: "We assume that if our interpretation of the oath is correct the City of Los Angeles will give those (fifteen) petitioners who heretofore refused to take the oath an opportunity to take it as interpreted and resume their employment." This observation appears to overlook the fact that those fifteen were discharged for a separately stated additional cause which was identical with the cause for which the petitioners Pacifico and Schwartz were discharged.

Since the judgment as to Pacifico and Schwartz was affirmed, without any qualifying observation in the opinion of the Court, the respondents assume that any future examination of the cases of the fifteen petitioners, either by the respondents or in the state courts, would necessarily result in a conclusion adverse to the fifteen—the conclusion that a renewed inquiry into the facts of their discharges for failure to take the oath would be of no avail, since their discharges for failure to execute the affidavit would stand in any event.

Nevertheless, the respondents do not desire that there be any basis for even a suspicion that they have not been

amenable to the wishes of the Court, and they urge that no room should be left for any contention that the opinion of this Court would support a renewal of the claims of those fifteen.

For these reasons, the respondents respectfully submit that the opinion of the Court should be reconsidered, either upon the Court's own motion or upon rehearing, and that upon such reconsideration the opinion should be modified to the following effect:

(a) That the discharge of each of the petitioners is sustained and affirmed for the cause separately stated in each case that he failed to execute the required affidavit.

(b) That the discharge of the fifteen petitioners, other than Pacifico and Schwartz, be further sustained and affirmed for the cause separately stated in each case that he failed to execute the required oath, upon the assumptions that *scienter* is implicit in each clause of the oath and that the oath was so construed and administered by the respondents, and upon the further assumption, there being nothing in the record to the contrary, that each of those fifteen petitioners so understood the oath.

The respondents submit that such modification should be effected for the following reasons:

1. To remove the possible inconsistency between the judgment and the opinion. The judgment of this Court affirms the orders below as to the discharges of Pacifico

and Schwartz. The discharges of those petitioners were based solely upon their refusals to execute the required affidavit. Each of them took and subscribed to the oath and, therefore, neither the validity nor any question of interpretation of the oath was involved in their cases. Each of the other petitioners was discharged for an identical stated cause—his failure to execute the affidavit. Additionally and separately, each of them was discharged for his failure to take the oath. Consequently, even if this Court had held the oath requirement to be entirely invalid, the discharge of each of those fifteen petitioners would have been sustained in consonance with the judgment of the Court as to Pacifico and Schwartz.

(It may be observed that the opinions of two of the Justices who did not agree with the opinion of the Court are not entirely inconsistent with a judgment so framed: the opinions of Mr. Justice Burton and Mr. Justice Frankfurter agree with the judgment as to Pacifico and Schwartz; on the other hand, the opinions of Mr. Justice Douglas and Mr. Justice Black appear to turn entirely upon their views as to the oath.)

2. To harmonize the decision with the status of the action in the courts of California.

It may be helpful to review the history of this matter, emphasizing certain facts, and to relate certain facts which, although they do not appear in the record, may serve to assure the Court that its assumptions as to the city's interpretation of the oath are well founded.

History of the Case.

The City of Los Angeles is a home-rule municipal corporation organized under a freeholders' charter according to the provisions of Article XI, Section 8 of the Constitution of California. Amendments to that charter are effected according to determinations at general elections of a majority of the city's voters. The approval of the legislature to such amendments is required, but amounts to no more than a ratification.

Under this constitutional system the people of the city, through their elected legislative representatives and their elected executive, have plenary power over personnel matters, free from any general control by the State Legislature. This power is complete and in its exercise in detail no express charter authority is required: the Los Angeles charter provisions in this field are limitations upon and are not grants of power.

City of Grass Valley v. Walkinshaw, 34 Cal 2d 595, 598, 599;

Ainsworth v. Bryant, 34 Cal. 2d 465, 469;

Butterworth v. Boyd, 12 Cal. 2d 140, 146, 147 150.

Charter Section 432 therefore is a limitation upon the city's power rather than a grant of power, and Ordinance No. 94,004 is an enactment by the people of the city under their constitutionally derived authority rather than according to authority contained in Charter Section 432. The state question in this connection is not whether the ordinance is authorized by the charter section, but whether the charter section in any way restricts the city's authority to enact the ordinance. That state question of course was

answered in the negative by the effect of the state court decisions.

The constitutional question, on the other hand, is whether the terms of the charter section repel at the outset any inquiry as to whether or not the ordinance oath requirement may constitute a bill of attainder or an *ex post facto* law. That question, by the judgment and opinion of this Court, is answered in the affirmative.

The detailed facts of the case here appear only from the petition to the Superior Court. Whether or not they are actually the facts would have appeared under the state practice, if the state court had thought that the petition stated a cause of action, from the respondents' answer and from the evidence thereafter adduced upon trial. The state court, however, thought that no cause of action was stated: it issued no writ, the respondents were not served with process, and the respondents therefore have never been before any trial court but have appeared herein merely as respondents on appeal. (*Cf. Wilson v. Los Angeles County Civil Service Commission*, 95 Cal. App. 2d 51, 212 P. 2d 265.) The facts asserted in the petition, discussed in the briefs, and related here, should be considered with this procedural history in mind.

Each of the seventeen petitioners was discharged for causes which were specifically separately stated in his notice of discharge. One of these causes was common in each of the seventeen cases, including the cases of Pacifico and Schwartz—that he failed to execute the required affidavit; a second was separately and *additionally* stated in the cases of the fifteen petitioners other than Pacifico and Schwartz—that he failed to take the required oath. In nine cases, including the cases of Pacifico and Schwartz, an additional count of insubordination was stated, that the

employee failed to execute the affidavit as instructed by his appointing officer. (This fact was not discussed in the briefs, and since seven of the Justices thought the stated cause of failure to obey the *ordinance* directive for execution of the affidavit to be beyond attack, and since the other two Justices did not examine that cause in their dissenting opinions, it seems unnecessary to comment further upon it.)

Before he was discharged and within the time fixed by the ordinance for compliance, each of the petitioners was separately solicited by the city for his reasons for delay and possible refusal, and each of the petitioners but one handed the city an extended statement of his views and reasons in attempted justification of his position. The correspondence in only one of the seventeen cases, that of Garner, was printed in the record. Further reference to this and to the whole record will be made hereafter.

Following his discharge for each of the several separate causes stated as to him, each of the petitioners demanded a review and hearing by the city's Board of Civil Service Commissioners, and an extended hearing, in which the petitioner testified at length, was held in each case. The record of these hearings was never prepared or submitted to the trial court and appears nowhere in the record before this Court. Comment on this fact will also be hereafter made.

The discharge of each petitioner was sustained by the Board of Civil Service Commissioners upon each of the causes stated in his case, and the petitioners then applied to the Superior Court for an alternative writ of mandate requiring the city forthwith to reinstate them in their positions or to come forward and assert the facts of the case. As we have heretofore noted, the refusal of the Superior

Court to issue the alternative writ, and the failure of the petitioners to come forward with the record before the Civil Service Commission or otherwise to improve their petition, resulted in the case proceeding up to this Court without the respondents ever joining issue or otherwise becoming subject to the jurisdiction or amenable to any judgment of the Superior Court.

This procedural history should not be overlooked because upon any trial of the facts the following would appear:

1. The city consistently administered the ordinance upon the basis that *scienter* is necessarily implied in the various undertakings contained in the required oath.

2. Contrary to the statements contained in the letters from Garner [Printed Record, page 22; Certified Record, page 32], Mann [Certified Record, page 40], Pacifico [Certified Record, page 43], and Schwartz [Certified Record, page 49], neither the City Attorney nor any other responsible officer of the city made any statement that enforcement of the ordinance or discharges for failure to comply therewith would be postponed after January 6, 1949. On the contrary, the uniform administrative position was that the ordinance would be enforced, like any other ordinance, unless its enforcement were enjoined, and in a connected suit for an injunction brought by the petitioner Garner [R. 22] the city successfully opposed an application for such an injunction.

3. Each of the petitioners understood *scienter* to be implied in the oath, and none of them in his pre-discharge justification, or in his hearing before the Board of Civil Service Commissioners, made any claim to the contrary or suggested that his refusal to take the oath was based upon any doubt that the oath implied *scienter* in each relevant connection.

4. Under the retirement provisions of the charter, one who has been in the service of the city for more than ten years may be placed upon a retirement pension when he reaches the age of 60, even though he was discharged from the city's service, and even though more than half of the retirement pension is paid from tax money. Retirement upon application in such cases is a matter of right under the charter. One who is so retired is ineligible to resume his former position, and one who has been discharged from his former position is held by his retirement to have waived claims that such discharge was invalid under the charter.

After their discharges were sustained by the Civil Service Commission one of the petitioners, Garner, applied for voluntary retirement; and nine of them drew down their contributions to the city's retirement funds. An employee who so withdraws his contributions is also held under state law to have voluntarily finally separated himself from the service of the city and to have waived any claims that he had been suspended, laid off or discharged in violation of the provisions of the charter in such connection.

5. Other factual and procedural claims in defense, available under state law, would have been urged by the city if it had been served with process herein.

For these and other reasons, a reversal of the order of the Superior Court by the District Court of Appeal would not peremptorily have directed that any specific relief be accorded the petitioners, but instead would simply have directed the Superior Court to issue its alternative writ of mandate and thereafter to proceed to trial and to such judgment as might then appear to be required.

Furthermore, under state practice the Superior Court does not finally issue a peremptory writ of mandate directing the reinstatement of a discharged petitioner, at least where all charter required procedures were followed in effecting the discharge, but instead directs the Board of Civil Service Commissioners to reopen its inquiry and hearing and to proceed to its own determination in accordance with the applicable principles of law declared by the Court in its judgment and writ. This procedure is particularly necessary because if a redetermination by the Board of Civil Service Commissioners results in its order for reinstatement of the employee, various problems arise which are properly to be determined, at least in the first instance, by the Commission, such as: (1) questions of just what is the position to which the employee is to be restored; and (2) questions of calculation of back salary to be paid and deductions therefrom on account of outside earnings in the interim.

In view of these propositions, we urge that it should not appear from the opinion of this Court that the respondents should forthwith initiate a further administrative review of the cases of the fifteen petitioners who refused to take the oath, and in this connection, we urge two additional propositions which also have not heretofore been emphasized in our briefs:

1. Pursuant to paragraph 8 of Rule 38, the petitioners requested the respondents to stipulate to a short printed record. The respondents complied, and the printed record therefore omits, among other things, the rather voluminous correspondence between the city and the petitioners other than Garner. The respondents submit that the entire record amply supports the conclusion that none of the

fifteen urged the lack of expressly stated *scienter* in the oath as his reason for refusing to execute it, and that none of them had any doubt that *scienter* was implicit in the oath. In fact, the reasons given by the fifteen for refusal to take the oath were for the most part the claims of bill of attainder and *ex post facto* which have been completely rejected by the opinion of the Court and as well by the opinion of Mr. Justice Frankfurter.

2. The respondents submit that the Board of Civil Service Commissioners was the tribunal before which the petitioners should have first raised the claim of deprivation of due process, or denial of the equal protection of the laws, as based upon the omission from the oath of express language of *scienter*. Since the petitioners saw fit not to bring into the Superior Court the record before the Board of Civil Service Commissioners, and since they alleged no facts in their petition to the Superior Court to show any such deprivation or denial upon that basis, it might well be conclusively assumed by this Court either that no such claims were made before the Board of Civil Service Commissioners, or that they were made there without factual support—that each of the petitioners expressly conceded there that he understood the oath to imply *scienter*, and that his reasons for refusing to take it had nothing to do with any doubt in his mind either as to his assertions of past activity or as to his undertakings for the future. Such assumptions would seem further warranted because each of the petitioners was represented before the Board of Civil Service Commissioners by counsel—the same counsel who argued their cases before this Court [R. 25]—*and because this issue was not thereafter sought to be raised by any of the petitioners either in the District Court of Appeal or before this Court.*

The Respondents' Administrative Interpretation of the Oath Provisions of the Ordinance.

We have heretofore assured the Court that its assumptions as to the respondents' interpretation of the oath are well founded. In the respondents' view, throughout, *scienter* is as implicit in relevant provisions of this ordinance oath as it is in any other oath, as, for example, the traditional oath of a witness that he will tell the truth, the whole truth and nothing but the truth, and these implications, in the view of the respondents, are further compelled by consideration of the stated and implicit purposes of the ordinance and of the oath provisions thereof.

The determination of the city's officers that no one should be misled is a matter of record [R. 21, 22] and is noted in the opinion of this Court. So far as we have been able to ascertain, none of the petitioners made the inquiry solicited of him from any officer of the city: certainly, no such inquiry was made of counsel for the city.

The respondents construe the words "affiliated with" in the ordinance oath to be intended to reach those sophists who deny record enrollment in a proscribed organization, but continue to give it obedience and active support. They construe those words to connote a purposeful and knowing effectuation of a connection with an organization of the described character, though such connection be other than a record enrollment, as by purposely accepting and following its orders and other discipline, working actively with it to accomplish its illegal aims, knowing their nature, and the like. In the respondents' conception, "affiliation" with a described organization is a question of fact to be established as such in each case as it may arise.

No other conceptions, so far as counsel have been able to ascertain, have been described by the respondents in

answer to any pertinent inquiry. There were only a few cases where the employee was concerned that he might be swearing to something that he could not know, and those employees' doubts were resolved by advice that *scienter* was implicit in the oath provisions as to membership or affiliation. Doubts were suggested also by employees who were members of the Seventh Day Adventists denomination, or who were members of Jehovah's Witnesses, and by representatives of each of those sects, as to whether or not the oath implied an obligation to bear arms in defense of the country. Those doubts were resolved by appropriate interpretations, and in each such case the employee took the oath.

The Effect of the Judgment Here Upon the Effectuation of the Ordinance in the Future.

Cases involving claims of applicable constitutional limitations have important effects in two phases:

1. Their effect upon the claims directly involved;

2. Their effect in the future application of the statute, ordinance or regulation concerned.

Where few are affected this Court may refuse review or may find significant in its determination the fact that few are affected (*American Communications Association v. Douds*, 339 U. S. 382, 397, 94 L. Ed. 925, 943). Here, the cases of only seventeen out of 29,000 city employees are directly presented, and in only two other cases was there a refusal to sign either the oath or the affidavit. Since the petitioners failed to raise the due process issue of *scienter* by appropriate factual allegations, since they otherwise declined invitations to improve their cases either before the Board of Civil Service Commissioners or in

their petition to the Superior Court, and since they did not raise that issue even in argument, the respondents submit that they are clearly not entitled at this late date to revitalize their cases on that issue in any renewed examination before the Board of Civil Service Commissioners or the state court. Such proposals could serve no large purpose unless the interests of others than the fifteen were also involved.

But no other interests are involved. On December 29, 1950, an amendment to Ordinance No. 94,004 became effective by which the oath required therein is the same oath required of all state employees by Sections 3100 to 3105 of the Government Code of the State of California. (See Appendix 4 to our respondents' brief herein.) While *scienter* is implicit, rather than explicit, in the new form of the oath as regards future membership, provision is made for the statement of exceptions as to past membership, and in any event, no case will arise in the future involving a failure to take the form of oath required of the petitioners here.

Under these circumstances, this case may well be treated as one where a few, advised by counsel, have failed either by factual allegations or in argument to raise the only constitutional question which seems to this Court to admit of any debate.

Questions may indeed arise in the future as to whether or not an employee committed perjury or swore falsely when he took the oath in the form required of these petitioners. The respondents, however, have never supposed that either perjury or a violation of the oath would appear by mere proof of membership in or affiliation with a proscribed organization, but rather have recognized that it would have

to appear in either case that the employee knew when he was a member that the organization was one which advocated or taught the overthrow by force, violence or other unlawful means of the Government of the United States of America or of the State of California, or that it would have to appear, if the employee was innocent of the organization's purposes when he became a member, that he nevertheless continued his membership after acquiring knowledge of the organization's aims.

However that may be, such problems may be determined when they are presented: they cannot be presented in the cases of the petitioners. Theirs are cases involving initial compliance, and if they still desire city employment and can truthfully take the required oath in its present form with the understanding that *scienter* is necessarily implied therein, all they need do (as suggested in our respondents' brief, page 53), is to come forward with an application for employment and qualify therefor on the same basis as does any other applicant. The undertaking for the future thus required of them will not disturb the most conscientious in this world of reality. A Tom Sawyer organization may withhold its aims and secrets until the blood brother is sworn as a member: an organization dedicated to violent revolution does not admit anyone to membership until it is satisfied of his zeal for its aims and of his subjection to blind obedience. One thus initially qualified could hardly complain that the day and the hour when the blow would be struck were not revealed to him before he pledged his obedience.

Conclusion.

In order that the opinion of this Court may be entirely consonant with its judgment and with the facts presented, the respondents submit that the opinion should be modified as above suggested.

Respectfully submitted,

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and

ALAN G. CAMPBELL,
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Attorneys for Respondents.

Certificate of Counsel.

I hereby certify that I am one of counsel for the respondents herein, and that I am a member of the bar of this Court. The within petition for rehearing is presented in good faith and not for delay.

Dated: June 18, 1951.

ALAN G. CAMPBELL.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of June, A. D. 1951.

6-18-51—60